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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. A-917 80-5119

JOSEPH MULLIGAN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

ON THE MERITS

I. SHOULD THIS COURT ESTABLISH THE MINIMUM QUALITY OF REPRESENTATION TO BE PROVIDED TO AN INDIGENT DEFENDANT TO BE, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, WITHIN THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES, AND IF SO, SHOULD THIS COURT NOTICE AS PLAIN ERROR THAT PETITIONER, AN INDIGENT DEFENDANT IN THE TRIAL COURT, WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS TRIAL AND DIRECT APPEAL TO THE SUPREME COURT OF GEORGIA BECAUSE OF HIS COURT-APPOINTED COUNSEL'S FAILURE TO PERFORM "WITHIN THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES", WHERE COURT-APPOINTED COUNSEL PROVIDED A PRO FORMA DEFENSE; FAILED TO PREPARE A TRIAL; AND COMMITTED NUMEROUS ERRORS WHICH INCLUDED, BUT WERE NOT LIMITED TO, HIS FAILURE TO OBJECT TO THE CONTINUED OVERZEALOUS MISCONDUCT OF THE PROSECUTING ATTORNEY AND FURTHER, FAILED TO ACT AS AN ADVOCATE DURING PETITIONER'S DIRECT APPEAL TO THE SUPREME COURT OF GEORGIA?

II. CAN THE STATE OF GEORGIA CONSTITUTIONALLY IMPOSE THE DEATH PENALTY IN THIS CASE UNDER GODFREY V GEORGIA, ____ US ____, 100 SCt 1759 (1980) WHERE GA. CODE ANN. §27-2534.1 (b)(7) WAS NOT DELIMITED BY THE TRIAL COURT IN ITS INSTRUCTION TO THE JURY AND THE MURDER IN QUESTION DID NOT INVOLVE TORTURE NOR WAS IT INORDINATELY DEPRAVED?

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STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1257(3). Petitioner requests this Court review the judgment and opinion of the Supreme Court of Georgia rendered on February 20, 1980, which judgment vacated the sentence of death imposed by the trial court as to Count I of the Indictment and remanded the case with direction that a sentence of life imprisonment be imposed, and as to Count II of the Indictment, affirmed the trial court's imposition of the death penalty, and the Addendum to that Opinion rendered on June 24, 1980 (R 1-10).

On April 28, 1980, Mr. Justice Powell signed an order extending the time for filing this Petition For Writ of Ceritorari to and including July 19, 1980.[1]

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1. A certified copy of the record has been lodged with the Clerk of this Court. Reference to the particular pages in the record will be preceded by "R"; when reference is made to the trial transcript there will be a dual reference to the record page and the trial transcript page. The trial transcript page will be preceded by the designation "TT".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, ...and to be informed of the nature and cause of the accusation...and to have the Assistance of Counsel for his defense [sic].

The Fourteenth Amendment to the Constitution of the United States provides that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Criminal Code of Georgia provides that:

SECTION 26-1101 MURDER

(a) A person commits murder when he unlawfully and with malice aforethought, either expressed or implied, causes the death of another human being. Express malice is that deliberate intention to unlawfully take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in a commission of a felony causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or imprisonment for life.

Ga. Code Ann. Section 26-1101 (1977).

SECTION 27-2503 PRESENTENCE HEARINGS IN FELONY CASES

(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and

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the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

Ga. Code Ann. Section 27-2503 (1977).

SECTION 27-2534.1 MITIGATING AND AGGRAVATING CIRCUMSTANCES: DEATH PENALTY

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by evidence:

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(4) The offender committed the offense of murder for himself or another, for the purpose or receiving money or any other thing of monetary value.

(7) The offense of murder, rape, armed robbery, kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Ga. Code Ann. Section 27-2534.1 (1977).

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STATEMENT OF THE CASE

The initial federal question presented regarding effective assistance of counsel has not been raised in the courts below. The reason the question has not been presented is that the same ineffective lawyer that represented the Defendant at trial, also represented the Defendant on the direct appeal to the Georgia Supreme Court. However, this Court "at its option...may consider a plain error...evident from the record...". Supreme Court Rule 34.1(a), effective June 30, 1980. (The substance of this new rule was formerly contained in Supreme Court Rule 40(1)(d)(2)).

In Vachon v New Hampshire, 414 US 478, 481 (1974), this Court has recognized that:

> ...In exceptional circumstances, especially in criminal cases, apellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. Silber v United States, 370 US 717, 718 (1962) (quoting United States v Atkinson, 297 US 157, 160 (1936).

Petitioner urges that if ever a record evidenced clear constitutional error, it is the record in this case.

The question of the constitutionality of the imposition of the death penalty in this case in light of Godfrey v Georgia, supra, was raised sua sponte by the Georgia Supreme Court and decided adversely to the Petitioner. (R 1-10).

Petitioner was arrested, tried, convicted and sentenced to death on an Indictment returned during the August term of Court in the year 1974 in the County of Muskogee, in the State of Georgia. The Indictment contained two counts: Count I alleged in substance, that on April 14, 1974, Petitioner

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along with one Timothy Helms did murder one Patrick Doe and as to Count II, that Petitioner in concert with Timothy Helms, did murder one Marian Jones Miller. The Indictment as to both counts alleged that the unlawful killings were accomplished by shooting the victims with a pistol. (R 70).[2]

Petitioner, was at the time of the shooting, a 20-year-old black youth with no prior criminal record.[3]

The Defendant was represented throughout the trial and the appeal to the Georgia Supreme Court by one William Fitt who was appointed by the Court. Mr. Fitt had five to ten years experience in law, the nature of his practice being general and "mostly criminal" (Judge's Report; R 108).

The Defendant was arrested in New York City on March 20, 1975. He was extradicted and returned to Columbus, Georgia on March 6, 1976. (Judge's Report; R 109).

Prior to trial, defense counsel made no pretrial motions on behalf of the Defendant. The state moved prior to trial to immunize Petitioner's co-defendant, Timothy Andrew Helms, on the grounds that his testimony was needed to secure the conviction of Petitioner who the District Attorney labeled as the "triggerman" in his motion requesting immunity for Helms (R 75-76). Said motion was granted and the trial court ordered that co-defendant Helms be given immunity (R 77).

No motion or demand for a list of witnesses was requested by the defense attorney in this capital case although authorized by Georgia law. Ga. Code Ann. §27-1403. The trial commenced on November 2, 1976, in the

2. The murder indictment was joined for trial with a second indictment alleging the unlawful taking of a "black plastic man's wallet of the value of $2 and the property of Patrick Doe with intent then and there of depriving the owner of said property. (R 72). The conviction resulting from that charge was not appealed to the Georgia Supreme Court and is in no way relevant to this petition.

3. This information is contained in the Judge's Report which report is required under Ga. Code Ann. §27-2537(a). This Court in Gregg v Georgia, 428 US 153, 167 (1976), characterized this report as follows:

> "The report is in the form of a 6 1/2-page questionnaire, designed to elicit information about the defendant, the crime, and the circumstances of the trial. It requires the trial judge to characterize the trial in several ways designed to test for arbitrariness and disproportionality of sentence. Included in the report are responses to detailed questions concerning the quality of the defendant's representation, whether race played a role in the trial, and, whether, in the trial court's judgment, there was any doubt about the defendant's guilt or the appropriateness of the sentence."

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Superior Court of Muskogee County before the Honorable Oscar D. Smith, Superior Court Judge. The first of three trial days were occupied by the selection of a jury. The county in which Petitioner was tried was estimated by the trial judge to be twenty-five to fifty percent black (Judge's Report; R 109). Blacks were on the venire of the panel from which the jury was selected but none served on the actual trial jury. (Judge's Report; R 109).

Out of the forty-four veniremen questioned, defense counsel posed questions to six.

Based almost entirely on the testimony of the immunized co-indictee Helms, the Georgia Supreme Court, in their opinion, summarized the evidence adduced at trial:

> The appellant became friends with Timothy A. Helms, his co-indictee, while the latter was stationed with the United States Marine Corps in Beaufort, South Carolina. On April 12, 1974, the appellant talked Helms into driving him to Columbus, Georgia, by offering Helms a fee of $1,000. During the drive, the appellant told Helms that he was going to Columbus, to "ice somebody". In accordance with the appellant's suggestion, the two spent the night of April 12-13 at a hotel in Columbus registered under false names. The next day, the appellant and Helms visited with Patrick A. Doe, an army captain at Fort Benning and the appellant's brother-in-law. In the afternoon, they joined Captain Doe in washing the latter's car. During this activity, the appellant and Captain Doe argued.
>
> That evening, with the appellant and Helms sitting in the back seat (the appellant seated directly behind the driver's seat), Captain Doe drove to the house of Marian Jones Miller, the Captain's girlfriend, to pick her up for a party. When Captain Doe left the car to get Ms. Miller, the appellant announced to Helms that he would "do it in the next two blocks."
>
> Following Captain Doe's return to the driver's seat and shortly after the car had begun to move again, the appellant held a .38 special automatic in a .45 frame, which the appellant had earlier borrowed from the captain, to the captain's head. The appellant fired once. He then ordered Helms to grab the now-abandoned steering wheel, but Helms was unable to do so before the car had struck both a stop sign and a mail box. When Ms. Miller, who was seated in the front seat next to Captain Doe, cried out for help, the appellant placed the gun across Helms' back and shot Ms. Miller as he told her to be silent.

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After Helms finally brought the car to a stop, the appellant and Helms towelled it off for finger prints and then ran. As they fled the scene of the crime, Helms threw away his bloody shirt and Captain Doe's wallet which he had removed from the body of Captain Doe at the appellant's instruction. Similarly, the appellant threw Captain Doe's gun into some bushes and his own clothes over a bridge.

The autopsy performed on Captain Doe showed that the bullet had entered the left eye, traveled through the brain, and exited the right temple. The autopsy of Ms. Miller revealed that she had been shot four times: in the left forearm, the left shoulder, the right upper arm, and the midportion of the back of the skull, with the exit wound of the last listed shot being the right eye. The cause of death for both victims was laceration and hemorrhage of the brain and cerebral trauma.

Several .38 shell casings were found in the captain's car along with a bullet. The State Crime Laboratory test indicated that the shell casings and the bullet found in Captain Doe's car had been fired by Captain Doe's .38 pistol. Finally, a latent fingerprint which had been lifted from the left door window of Captain Doe's car was found to match a rolled print of the appellant's left middle finger.

The evidence also revealed that Captain Doe had filed a divorce action against the appellant's sister and that Captain Doe had told the appellant on the day of the captain's death, that his divorce from the appellant's sister would be final soon.

Absent details as consistent with innocence as with guilt, the state's case rested almost completely on the testimony of Helms.

In attempting to deal with Ga. Code Ann. §38-121 which requires corroboration in any case of a felony where the sole witness is an accomplice, the Georgia Supreme Court held as follows:

> Having thoroughly reviewed the present appellate record, we hold that the testimony of Timothy A. Helms, the appellant's accomplice, regarding the history of the appellant's crimes, is amply corroborated by other evidence. Further, Helms' testimony as to appellant's identity and participation in the present crimes is independently corroborated by the testimony of three witnesses who saw the appellant in the company of Captain Doe on the afternoon and evening of the day of the shooting, and, by the appellant's latent fingerprint which was lifted from the left door window of the victim's car.

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Subsequent to closing arguments of counsel and the instructions of the Court, all of which will be discussed at length in the "Reasons For Granting The Writ" section of this Petition, the jury retired to deliberate at 11:05 a.m. Fifty minutes later they returned with a verdict of guilty as to all counts. (TT 267, 268; R 400, 401). The penalty stage of the proceedings began after lunch. Neither the prosecutor nor the defense counsel offered evidence. Both sides argued. The jury returned their recommendation of the death penalty as to both counts. (R 80-81).

On November 24, 1976, a notice of appeal was filed by trial attorney, Jay William Fitt (R 67). On February 3, 1977, a motion for a new trial was filed with the trial court. In a terse statement, Attorney Fitt alleged newly discovered evidence as the grounds (R 86). The prosecution having filed a response to the Motion For New Trial (R 88), the Court ordered an evidentiary hearing to be held on the 19th day of December, 1977, at 9:45 a.m. (R 90). On December 21, 1977, an ex parte order was entered by the trial judge requiring the Sheriff of Muscogee County, Georgia and/or his lawful deputy to produce one James Everet to give testimony at the evidentiary hearing which had apparently been rescheduled for January 16, 1978 (R 92). On February 16, 1978, the Court denied Defendant's Motion For a New Trial (R 94).

The Supreme Court of Georgia issued an opinion on February 20, 1980 which vacated the sentence of death imposed by the trial court as to Count I of the Indictment and remanded the case with directions that a sentence of life imprisonment be imposed. As to Count II, the Georgia Supreme Court affirmed the trial court's imposition of the death penalty (R 1-8).

On April 28, 1980, Mr. Justice Powell signed an order extending the time for filing this Petition For Writ of Certiorari to and including July 19, 1980.

On June 24, 1980, the Supreme Court of Georgia issued an Addendum to its opinion re-examining this case in light of Godfrey v Georgia, ___US___, 100 SCt 1759 (1980) (R 10) and found that the facts justified the jury verdict that Ms. Miller's murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, and depravity of mind."

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REASONS FOR GRANTING THE WRIT

I. PETITIONER, AN INDIGENT DEFENDANT IN THE TRIAL COURT, WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS TRIAL AND DIRECT APPEAL TO THE SUPREME COURT OF GEORGIA BECAUSE OF HIS COURT-APPOINTED COUNSEL'S FAILURE TO PERFORM "WITHIN THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES", WHERE COURT-APPOINTED COUNSEL PROVIDED A PRO FORMA DEFENSE; FAILED TO PREPARE FOR TRIAL; AND COMMITTED NUMEROUS ERRORS WHICH INCLUDED, BUT WERE NOT LIMITED TO, HIS FAILURE TO OBJECT TO THE CONTINUED OVERZEALOUS MISCONDUCT OF THE PROSECUTING ATTORNEY AND FURTHER, FAILED TO ACT AS AN ADVOCATE DURING PETITIONER'S DIRECT APPEAL TO THE SUPREME COURT OF GEORGIA.

Because the right to counsel is fundamental to a fair trial, Gideon v Wainwright, 372 US 335 (1963); Powell v Alabama, 287 US 45 (1932), this Court should determine what level of competence satisfies the constitutional imperative, especially in a death penalty case. As Mr. Justice White, joined by Mr. Justice Rehnquist, argued in their dissent from the denial of certiorari in Marzullo v Maryland, 561 F2d 540 (4th Cir. 1977), cert denied, 435 US 1011 (1978), the present Court should "attempt to eliminate the disparities in the minimum quality of representation required to be provided to indigent defendants. In refusing to review a case which so clearly frames an issue that has divided the Court of Appeals, the Court shirks its central responsibility as the court of last resort, particularly its function in the administration of criminal justice..." supra, at 1013.

There is a generally recognized need for a uniform national standard to measure the competency of counsel. Presently there are three major tests and innumerable derivations used by federal and state courts to decide

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claims of ineffective counsel. Two circuits[4] and nineteen states[5] require that a defendant show that the proceedings were a "farce and mockery of justice". Five circuits[6] and ten states[7] subscribe to the view articulated in McMann v Richardson, 397 US 759 (1970), that the level of representation furnished the defendant must be within the "range of competence demanded of attorneys in criminal cases".[8] Two circuits[9] and four states[10] take a different approach by requiring that defense counsel be "reasonably likely to render and actually be rendering reasonably effective assistance." Other jurisdictions have either altered these tests[11] or have decided standards of their own.[12]

4. See United States v Bubar, 567 F2d 192 (2nd Cir.) cert denied, 435 US 872 (1977); United States v Nelson, 582 F2d 1246 (10th Cir. 1978); cert denied, 439 US 1079 (1979).

5. The states retaining the "farce and mockery" standard are as follows: Walker v State, 355 So. 2d 755 (Ala. Crim. App. 1978); Donnelly v State, 516 P. 2d 396 (Alaska, 1973); State v Smith, 112 Ariz. 208, 540 P. 2d 680 (1975) (en banc); Deason v State, 562 S.W. 2d 79 (Ark., 1978); Gibson v State, 351 So. 2d 948 (Fla. 1977); People v Murphy, 72 Ill.2d 421, 381 N.E. 2d 677 (1978); Keys v State, ____ Ind. ____, 390 N.E. 2d 148 (1979); Nickel v Commonwealth, 565 S.W. 2d 145 (Ky., 1978); State v Dutremble, 392 A. 2d 42 (Me., 1978); State v Miller, 568 P. 2d 130 (Mont., 1977); Shuman v State, 578 P. 2d 1183 (Nev., 1978); State v Bonet, 132 N.J. 186, 333 A. 2d 267 (1975); State v Garcia, 85 N.M. 460, 513 P.2d 394 (1973); State v Sneed, 284 N.C. 606, 201 S.E. 2d 867 (1974); Felts v State, 588 P. 2d 572 (Okla. Crim. 1978); State v Pendergrass, 270 S.C. 1, 235 S.E. 2d 750 (1977); Jaramillo v Turner, 24 Utah 2d 19, 465 P. 2d 343 (1970); In re King, 133 Vt. 245, 336 A. 2d 195 (1975); Slayton v Weinberger, 213 Va. 690, 194 S.E. 2d 703 (1973).

6. United States v Bosch, 584 F2d 1113 (1st Cir. 1978); Moore v United States, 432 F2d 730 (3rd Cir. 1970); Marzullo v Maryland, 561 F2d 540 (4th Cir. 1977); cert denied, 435 US 1011 (1978); United States v Easter, 539 F2d 663 (8th Cir), cert denied, 434 US 884 (1976); Cooper v Fitzharris, 586 F2d 1325 (9th Cir.) (en banc); cert denied, 440 US 974 (1978).

7. People v Blalock, ____ Colo. ____, 592 P.2d 406 (1979); State v Anonymous, 34 Conn. Supp. 656, 384 A.2d 386 (1978); State v Killpack, 276 N.W.2d 368 (Iowa, 1979); Commonwealth v Adams, ____ Mass. ____, 375 NE 2d 681 (1978); State v King, 262 NW 2d 709 (Minn. 1978); State v Mays, 203 Neb. 487, 279 NW 2d 146 (1979); State v West, 117 NH 343, 373 A.2d 348 (1977); Baxter v Rose, 523 S.W. 2d 930 (Tenn. 1975); State v Thomas, 203 S.E. 2d 445 (W.Va. 1974); State v Harper, 57 Wisc. 2d 543, 205 N.W.2d 1 (1972).

8. McMann v Richardson, 397 US 759 (1969) seems to suggest this test. In McMann, this Court reviewed the validity of a defendant's conviction which was based on a guilty plea that was in turn based on erroneous advice of counsel. This Court stated that the issue turns "not on whether a Court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases", supra at 771.

9. MacKenna v Ellis, 280 F2d 592 (5th Cir. 1960), cert denied, 368 US 877 (1961); Wilson v Cown, 578 F2d 166 (6th Cir. 1978).

10. Pitts v Glass, 231 Ga. 638, 203 S.E. 2d 515 (1979); Stewart v State, 576 S.W. 2d 53 (Miss. 1969); State v Kroeplin, 266 NW 2d 537 (N.D., 1978); Flores v State, 576 S.W. 2d 632 (Tex. Crim. App., 1978).

11. Other standards used by various jurisdictions include: "a reasonable basis for counsel's actions", see Commonwealth v Badger, 482 Pa 240, 393 A.2d 642, 644 (1979); "genuine and effective representation", see Harris v State, 293 A.2d 291 (Del. 1972); Davis v State, 40 Md. App 467, 391 A.2d 872 (1978); State v Desrouches, 110 R.I. 497, 293 A. 2d 913 (1972); "conscientious meaningful representation", see State v Kendall, 167 N.W. 2d 909, 910 (Iowa, 1969).

12. United States v Fleming, 594 F2d 598 (7th Cir.) cert denied, 442 US 931 (1979) (a minimum professional standard is required); Coleman v United States, 379 A.2d 710 (D.C. App., 1977) (substantive defense required); State v Kahalewa, 54 Ha. 28, 501 P.2d 977, (1972) (criminal defendant asserting ineffective assistance

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Such diversity among the various state and circuit courts is illustrative of the disarray in which this area of the law currently stands. Lower courts are dissatisfied with the varying standards and the confusion they generate. The Eighth Circuit in McQueen v Swenson, 498 F2d 207 (8th Cir. 1974) has noted that the Supreme Court's failure to enumerate clear standards for the courts to follow has left the circuit courts without guidance, groping for the correct prescription to apply, supra, at 214.

Petitioner urges that the test adopted by the United States Court of Appeals for the First, Third, Fourth, Eighth and Ninth Circuits is the one most likely to insure an accused the kind of representation demanded by the Constitution. Petitioner prays that this Court establish guidelines regarding the minimum standard of representation required by the Constitution. Petitioner submits, quite simply, that the Court mandate that the minimum threshold for constitutionally effective representation must, at the very least, be "within the range of competence demanded of attorneys in criminal cases." Applying that standard to the case at bar, we will demonstrate that Petitioner has been denied the effective assistance of counsel guaranteed by the Constitution.

The "farce and mockery of justice" test is rapidly being abandoned because it is inadequate to meet the constitutional requirements of the Sixth Amendment. As Judge Bazelon has stated, "The mockery test requires such a minimal level of performance from counsel that it is itself a mockery of the Sixth Amendment."[13] Moreover, the test provides little guidance for either the reviewing court or the practitioner.[14] It offers no guidelines as to what kinds of practices or omissions are ineffective.

12. (continued) has the burden of showing that the representation he received was so incompetent and inadequate that the total effect was that of complete absence of counsel); Stevens v State, 560 SW 2d 599 (Mo. App. 1978) (deprivation of a fair trial); State v Lytle, 48 Ohio St. 2d 391, 358 NE 2d 623 (1976) (substantial violation of defense counsel's essential duty to his client).

13. Bazelon, The Defective Assistance of Counsel, 42 U. Cinn. L.Rev. 1, 28 (1973). The most outrageous example of an application of the farce and mockery test appears in United States v Katz, 425 F2d 928 (2d Cir. 1970). In this case, the Second Circuit ruled that the defendant had not demonstrated "farce and mockery of justice" when he alleged inter alia that his attorney had slept through portions of the trial. The court rationalized its decision upon the fact that counsel had only missed testimony of relative unimportance and the statement by the trial judge that she would have awakened the attorney if any testimony had occurred, Id at 931.

14. The court which first articulated the test, Diggs v Welch, 148 F2d 667 (D.C. Cir.), cert denied, 325 US 889 (1945), admitted "There are no tests by which it can be determined how many errors an attorney may make before his batting average becomes so low as to make his representation ineffective", supra, at 670.

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The test is also much too narrow. Because the defendant must show that the proceedings were a farce, many mistakes and omissions committed by defense counsel before trial will elude the attention of the reviewing court.[15]

The standard adopted by Fifth and Sixth Circuits, which Petitioner will be bound by if he is required to seek relief by way of federal habeas corpus[16] is likewise unable to assure a defendant his Sixth Amendment right to effective counsel. By requiring that an attorney be "reasonably likely to render and actually be rendering reasonably effective assistance," a court actually requires very little. The term "reasonable" can many times be ambiguous, providing no guidance to reviewing courts.[17] Before any Court weds itself to this test, it should ask itself if it would be satisfied to be married to a spouse who is reasonably likely to be faithful and is in fact reasonably faithful.

The reasonably effective standard presents appellate judges with an accessible escape hatch through which they can rationalize their demonstrated reluctance to put their fellow attorneys on trial.[18]

Because of the shortcomings of the standards, Petitioner respectfully urges the present court to adopt a test based on the language of McMann which dictates that the representation furnished defendant be within the "range of competence demanded of attorneys in criminal cases."

Adoption of this standard would prove advantageous in several ways. Under the McMann language, a reviewing court is encouraged to scrutinize specific acts or omissions of defense counsel, rather than to make a generalized determination of whether the trial was a farce. Instead of basing its

15. Much of the attorney's work is performed before trial, ABA Project On Standards For Criminal Justice, Criminal Justice Section, Standards Relating to the Defense Function (Approved Draft, 1971) at 147-148 (hereinafter cited as Defense Standards), and is consequently not in the record. See, Holloway v Arkansas, 435 US 475, 489-490 (1978).

16. Easter v Estelle, 609 F2d 756 (5th Cir. 1980).

17. "Although the second plateau appears to mark an improvement, there is, in Dorothy Parker's phrase, 'less here than meets the eye; the new test is built on words like 'customary' or 'reasonable', which are themselves empty vessels into which content must be poured. Such standards beg the question of what is customary or reasonable for a lawyer to do prior to or at arraignment, plea bargaining, trial or sentencing." Bazelon, The Realities of Gideon and Argersinger, 64 Geo.L.J. 811, 820 (1976).

18. Many courts are reluctant to put defense counsel on trial before a reviewing court, see Note, Ineffective Representation as a Basis For Relief from Conviction, 13 Colom.J.L.A. Soc. Prob. 1, 36, (1977). One court has expressed the fear that active review of ineffective assistance claims would deter attorneys from taking criminal cases, Mitchell v United States, 259 F2d 787, 793 (D.C.Cir.) cert denied 358 US 850 (1958).

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evaluation of counsel's performance on more personal judgment, the reviewing court can look to facts within its own knowledge or those that can be determined by inquiry. Cooper v Fitzharris, 586 F2d 1325, 1329-1330 (9th Cir.), cert denied, 440 US 974 (1978).[19]

Secondly, review under the language used in McMann is not limited to only the trial. Defense counsel must meet the standard of effectiveness throughout his representation of the defendant.[20]

Thirdly, use of this test is more consistent with the instant Court's past "characterization of the substance of the constitutional right to assistance of counsel", in McMann, supra and Tollett v Henderson, 411 US 258 (1973), 586 F2d at 1330.

The facts underlying the initial reason urged for granting of the Writ are not pleasant ones to confront. They involve a stereotype of American justice at its worst. A young indigent black man with no history of criminal involvement is convicted in a rural southern community by an all white jury and sentenced to die in Georgia's electric chair. This, after what Petitioner will demonstrate, was a trial during which the prosecutor's unobjected to overzealous misconduct and the court-appointed defense counsel's inability to perform "within the range of competence demanded of attorneys in criminal cases" combined to deny the defendant his Sixth Amendment rights to the effective assistance of counsel and a fair trial as those rights have been made applicable to the states through the due process clause of the Fourteenth Amendment.

19. The normal competency test bears a close resemblance to the standard set forth in Restatement (Second) of Torts, §299A(1965), for professional competence: Undertaking in Profession or Trade:

> "Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities. Marzullo v Maryland, supra, n.6 at 544, n.9.

20. As the court in Cooper v Fitzharris, has noted: "This rephrasing ['reasonably effective and competent defense representation'] ...focuses inquiry upon the subject matter of the constitutional guarantee counsel's performance. It avoids the misleading implication that what occurred at trial and appears on the face of the record is all that is relevant." supra, n.6 at 1329.

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This Court has taken great pains to insure "that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v Florida, 430 US 349, 357-358 (Opinion of Stevens, J.) (1977).

In its most recent opinion dealing with the constitutional restrictions on the imposition of the death penalty this Court has held that "the same reasoning must apply to rules that diminish the reliability of the guilt determination." Beck v Alabama, 48 USLW 4801, 4804 (US June 20, 1980).

Petitioner respectfully urges that all of this Court's efforts and guidance will be of little value to a defendant facing the death penalty if the states are free to appoint ineffective lawyers to represent indigent defendants and state prosecutors are free to use any tactics they so choose in seeking a verdict of death.

Standards of representation should come post haste from this Court regarding the quality of representation constitutionally required for an indigent defendant facing the sentence of death.

With the population on the various death rows burgeoning there is simply no way of knowing how many men similarly situated to Petitioner (in terms of the unfair trial that we will demonstrate he received) will give up the battle rather than face the prolonged agony of years on death row. There is also no reliable way of measuring the number or percentage of death row inmates similarly situated to Petitioner who will be represented throughout their various appeals right to the time that they are strapped into the electric chair by the same attorneys who represented them at trial. Needless to say, it is hard to believe that such an attorney would be ready and/or willing to claim that his trial defense was incompetent. That is why this Court should at this time educate the death penalty states to the fact that when the death penalty is meted out after a trial in which the defendant was, for all practical purposes, denied counsel, and the prosecutor was allowed to score "foul blows" Berger v United States, 295 US 78, 88 (1934), at will, there is substantial doubt that the decision-making process as to guilt and sentencing was based on "reason rather than caprice or emotion." Gardner v Florida, supra; Beck v Alabama, supra.

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There follows a series of excerpts from the trial which graphically demonstrates the merit of Petitioner's claim. The issues of ineffective assistance of counsel and prosecutorial misconduct are hopelessly intertwined in this case. This is so, because defense counsel objected to practically nothing the prosecutor did, no matter how outrageous. Therefore, the two issues of constitutional dimension will be treated as if they are one.

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A. THE LACK OF PRETRIAL PREPARATION AND THE COLLOQUY IN THE PRESENCE OF THE JURY REGARDING DEFENSE COUNSEL'S DISINTEREST.

The record demonstrates that court-appointed counsel filed no pretrial motions on behalf of Petitioner nor did defense counsel make the minimum effort of filing a demand of the prosecutor for a list of witnesses, although such a list is available pursuant to Georgia law (Ga.Code Ann. §27-1403). During the course of trial the state called a latent fingerprint expert to the witness stand. The following amazing colloquy took place in the presence of the jury:

BY MR. WHISNANT:

Q: State your name.

A: David Rice.

Q: Mr. Rice, where are you employed?

A: Columbus Police Department.

Q: And what are your duties there, where do you work?

A: I work in the identification division, fingerprints and photography.

Q: What is your rank?

A: Sergeant.

Q: How long have you been in I.D. work?

A: Ten years.

Q: What training did you have?

A: I have been to numerous schools throughout the southeast, including F.B.I., in fingerprints, and I have studied under experts who have been in the department prior to me.

Q: All right, sir; did you take rolled prints of the defendant, Joseph Mulligan?

A: Yes, I did.

Q: When did you do that?

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A: I have it here, Mr. Whisnant.

Q: Do you have the car that you rolled them on?

A: Yes, I do.

Q: All right, let me see it and mark it.

A: On the 24th day of August.

Q: All right, I hand you State's Exhibit 34, and ask you does that contain the rolled prints that you made of the defendant in this case, Joseph H. Mulligan?

A: Yes, it does.

MR. FITT:

If Your Honor please, may we approach the bench?

THE COURT: Yes, sir.

(A discussion was had off the record at this time).

MR. FITT:

Your Honor, I want to make an objection that I have not been apprised either verbally or in writing, orally or in writing, of the existence of Sergeant Rice as a witness, and not having been apprised of his existence, I'm going to object to his testimony and any evidence that he might present.

Now, the District Attorney may very well say that I didn't make a demand. It's the habit and policy of the District Attorney's office that when counsel is either announced or appointed in cases, they were furnished the initial Bill of Indictment and a list of witnesses.

It seems to me to be an exercise in futility to make a formal demand for witnesses. We talked about witnesses, there are some he gave me orally which I've noted, and this was not one we discussed, therefore I object to his testimony and any evidence that might be elicited as a result of his testimony.

MR. WHISNANT: If Your Honor please, he made no written demand for a list of witnesses. What the custom of the office is not the law. I did try to furnish him a list of witnesses, and last Friday, I believe it was, I called Mr. Fitt and I said, "I want to give you all the witnesses I have."

I gave him the witnesses, the names of some witnesses he didn't have, and I said, "Come down and let's compare the list and see if you are missing any," and he at that time said, "Well, I'm not interested," that's the way it is --

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MR. FITT: That's not what I said.

MR. WHISNANT: That's my recollection of it, and I say that that's what he said, he said, "I'm going to try the case, I'm not going to make any objections about witnesses."

I'm willing to let this witness go down, I'm willing to tell Mr. Fitt what he's going to say and let him talk to him before he cross-examines him.

And also at the time the list of witnesses was furnished to him, we didn't know about this witness, because no comparison had been made, comparison hadn't been made until the last month or so, although we had the latent print from Sergeant Keller.

MR. FITT: This argument in the presence of the jury is extremely prejudicial --

MR. WHISNANT: Why didn't you ask for them to go out?

MR. FITT: That's what I'm doing.

MR. WHISNANT: All right, let them go out.

THE COURT: I wonder if this wouldn't be an appropriate time to break this case, suppose you step back up here, and let's recess for the night. Step back up here if you will, gentlemen.

(A discussion was had off the record, at this time).

MR. FITT: Your Honor, to further perfect the record, I would say that the District Attorney offered me the names of additional witnesses that were not furnished on this list. He has a copy of every list that he has furnished, or he should have, and in offering these additional names that he did not mention Sergeant Rice or even Detective Keller as I can recall.

MR. WHISNANT: Your Honor, I state in my place that no written demand has been made on a list of witnesses, that we furnished them to him as a gratuity, that I gave him the list, gave him the names of some people that I recalled, I wasn't looking at a list when I gave him the names. At that time, I asked him to bring a list and let us sit down and see if we could get our list together, and then I talked to him later which I believe yesterday morning, and told him about Mr. Everet who just testified, and it was his statement at that time that I'm not concerned with who's going to testify, I'm just going to try the case, that was the last thing he said.

THE COURT: In view of the fact there as no demand for the list, I'm going to overrule the objection.

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MR. FITT: Your Honor, I would say that the District Attorney's tender of a list of witnesses is tantamount to accepting a demand and complying with the demand.

MR. WHISNANT: No demand has been made on me, I did it as a courtesy to a lawyer, and I don't feel like I'm bound by that.

THE COURT: All right, go ahead. (TT 226-230;R 359-363).

This colloquy was significant for several reasons. First of all, it reinforces the record's implication that defense counsel was ill-prepared Second, this dialogue in the presence of the jury could only be taken by members of the panel to infer that defense counsel himself had given up on his client. Thirdly, the very fact that it took defense counsel so long to realize that this kind of dialogue was "extremely prejudicial" reflects on his ability to try a felony case of any kind let alone a case involving capital punishment. Fourthly, the prosecutor's overzealousness comes bounding from the pages of the transcript as he eagerly seizes the opportunity to "testify" before the jury about defense counsel's disinterest in preparing the case. Finally, defense counsel's lapse in not knowing about the fingerprint expert in advance left him totally unprepared to take on this meaningful and well prepared expert witness.

The Supreme Court of Georgia placed a great deal of significance on the latent print discussed by this witness when it listed the latent print as one of the corroborating circumstances surrounding the accomplice testimony.

Much was made by the prosecutor of the term "fresh print".[21] Adequate preparation would have led defense counsel to the revelation that the literature supports the proposition that "experienced technicians can usually tell whether a latent is an old one or a fresh one, but there is no method whereby a technician can state, with certainty that a print was one day or three days old or three months or a year old."[22]

A motion for discovery of scientific evidence for independent inspection that could have been made prior to trial would surely have met with success under Georgia law. Gilliland v State, 142 Ga App 374, 285 SE 2d 780 (1977). Were such a motion to be denied the United States Court of Appeals

21. Both during direct examination (TT 231-234;R 364-367) and closing argument (TT 250;R383).
22. Moenssens, A., Fingerprints and the Law, (1969), 26-27.

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for the Fifth Circuit in which Georgia sits would have held that to be a violation of the fundamental fairness required by the due process clause Barnard v Henderson, 514 F2d 744 (5th Cir. 1975).

During the testimony of Captain Leroy Moultrie the defense attorney's complete inability to prepare for trial and contact witnesses and his misplaced reliance on the good faith of the prosecutor again surfaced. Although Moultrie's testimony added little, to wit: that Petitioner was at Fort Benning on the day of the murders, the cross-examination underscored Attorney Fitt's lack of pretrial preparation:

BY MR. FITT:

Q: Did the District Attorney tell you that I wanted to talk with you?

A: No.

Q: He didn't?

A: Huh, uh.

MR. FITT: I'll state my place I asked for --

MR. WHISNANT: I object to that, Your Honor.

MR. FITT: -- permission --

MR. WHISNANT: I object to him making speeches in front of the jury like that.

THE COURT: Yes, sir.

MR. WHISNANT: I mean he has the right to get out and hunt witnesses and subpoena them like I do.

Q: Is your telephone number 502 798-2546?

A: That used to be my telephone number until my family joined me and I moved out of that apartment and moved into on-post housing, the number is now 798-3609 which is an unlisted number. That one you have is an unlisted number, too.

Q: You were not informed by the District Attorney that I would like to have an opportunity to talk with you before this?

A: No, I was not informed. (TT 117;R 242).

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The testimony of Lt. Eric A. Barrett was insofar as defense counsel is concerned almost an instant replay of Captain Moultrie. Lt. Barrett also identified Petitioner as having been on the Army base on the day of the murder. During recross-examination, defense counsel propounded the following questions and received the following answers:

BY MR. FITT:

Q: Did the District Attorney tell you that I would like to talk to you before this trial?

A: Would you state that question again?

Q: Did any member of the District Attorney's office tell you that I wanted to talk to you before you testified?

A: You personally sir?

Q: Yes.

A: No, I was not informed.

Q: You were not informed of that?

A: No I was not.

Q: Thank you. (TT 125-126;R 250-251).

It should be noted that both Captain Moultrie and Lt. Barrett were still in the armed services at the time of the trial. Why Mr. Fitt had to rely on the prosecutor's office to contact these witnesses is beyond imagination. It certainly would not have taken Sherlock Holmes to track them down and attempt to obtain written statements from them. The fact of the matter is that a motion for the state to provide funds with which to hire an investigator would seem to be required by the due process clause. Mason v Arizona, 504 F2d 1345 (9th Cir.), cert denied, 420 US 936 (1974).

Since "investigation and preparation are keys to effective representation", ABA Project On Standards For Criminal Justice, Standards Relating To The Prosecution Function And The Defense Function 224 (App. Draft) (1971)[23], court-appointed counsel have a duty to interview potential

23. The ABA Standards go on to outline the duty to investigate. §4.1 provides: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

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witnesses and "make an independent examination of the facts, circumstances, pleadings and laws involved" Van Multke v Gillies, 332 US 708, 721 (1948). Obviously, defense counsel cannot fullfill this duty if he doesn't even attempt to discover who the prosecution witnesses will be. Attorney Fitt was consequently in no position to intelligently evaluate Petitioner's case and this directly resulted in his ineffectiveness at trial. Defense counsel's failure to prepare for trial, in conjunction with the many other errors to be delineated, deprived Petitioner of his right to counsel.[24]

B. VOIR DIRE

One of the first indications of counsel's ineffectiveness appears during voir dire. Attorney Fitts' apparent lack of concern with the case at bar manifested itself in his failure to actively participate in the questioning of the venire.

Out of forty-five veniremen, defense counsel only questioned six.[25] The questions he did put to the prospective jurors were cursory[26] and many times, simply a reiteration of those asked by the prosecutor. (TT 40;R 165, 43,R168, 52;R177). When counsel did address the panel he never once mentioned that Petitioner was presumed innocent under the law. At one point in the proceedings, counsel admitted he wasn't even listening to the responses of the veniremen. (TT 50;R175).

The purpose of voir dire is "...to determine whether the veniremen are qualified, whether they have prejudged the case, and whether their minds

23. (continued) The commentary to this section states that defense counsel "...should always urge the prosecutor to disclose the facts even though he must then proceed to verify them. Experienced defense counsel routinely approach the prosecutor at an early stage of their own investigation, except in unusual circumstances."

24. For other cases dealing with defense counsel's failure to prepare for trial, see Ewing v Williams, 596 F2d 391 (9th Cir. 1979); Davis v Alabama, 596 F2d 1214 (5th Cir. 1979); and MacKenna v Ellis, 280 F2d 592 (5th Cir. 1960). All of those cases held that inadequate preparation for trial, when combined with other errors, (such as the failure to move to suppress an in-court identification in Ewing), amounted to ineffective counsel.

25. Those that were questioned included: Mrs. Peddicord (TT 21;R146); Ms. Grant (TT 40;R165); Ms. Burleson (TT 43;R168); Mr. Causey (TT 50;R175); Mr. Blanton (TT 52;R177); and Mr. Jones (TT 8;R133).

26. Of those veniremen Mr. Fitt questioned, he only inquired about employment and past jury experience. (TT 8;R133,40;R165,50;R175, 52;R177).

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are free from prejudice or bias...," Kruether v United States, 376 F2d 654, 656-657 (10th Cir.) cert denied, 390 US 1015 (1967). It is considered to be an "...integral, vital element of a fair trial." United States v Woods, 364 F2d 481, 483 (3rd Cir. 1966); and an important step in selecting a jury.[27] Thus, it is difficult to understand defense counsel's inaction.[28] There is no indication in the record that attorney Fitt's behavior was part of his trial strategy. Defendant counsel's performance severely limited the possibility of Petitioner being tried by a fair and impartial jury.[29]

C. THE SO-CALLED INSURANCE MOTIVE

In his opening statement to the jury, the prosecuting attorney in attempting to ascribe a motive to the allegations against Mulligan made the following statements:

> We're going to show you that the motive in this case was that this man's sister was getting a divorce from the Captain, that he had an insurance policy that was made to his sister, and that he came down here to get rid of him before the divorce was final so that they could get that insurance money.
>
> We're going to show you that it was a killing for hire so far as Doe was concerned, that's what he was talking about when he said, there's big money in it for us, I'm going down there and ice somebody. (TT 75-76;R200-201).

This theme was repeated in the prosecutor's closing argument:

> All right, let's talk about -- I'm sure you'll think about it, what was his motive? It had to have something to do with divorce, with the fact that he was in the Army, he was interested in money. He was out there that afternoon when he was washing cars, asking Captain Moultrie how much does a Captain make. Probably figuring in his mind how much money his sister would get when he was dead, if he could get him killed before that divorce became final, that's what he was after. So the motive is the money, the insurance he had as a Captain in the Army, that's what he was after. Greed. (TT 247,248;R 380, 381).

Of course, it takes no legal authority to recognize that a prosecutor has the right to introduce evidence of a motive and argue the same to the jury. However, there was not so much as a scintilla of evidence introduced either as

27. William W. Daniel encourages defense attorneys to take advantage of the voir dire examination. He noted that "The importance of voir dire examination...cannot be overplayed in selecting a jury." Georgia Criminal Trial Practice, 218,219, §18-12 (1977).

28. The prosecutor was of course predictably busy as a bee during this period disqualifying jurors who held conscientious objections to the death penalty.

29. The Fifth Circuit dealt with a similar situation in Wilson v United States,

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to the existence of an insurance policy or the fact that Mrs. Doe, Mulligan's sister was the beneficiary on such policy. These objectionable and prejudicial statements were made both in opening and closing and went in without so much as a mild whimper from the defense attorney.

If it is argued that the prosecutor in his closing statement reminded the jury that what he said was not evidence and therefore these comments were not prejudicial since the jury probably ignored it, we direct this Court's attention to the trial judge's report wherein he makes the statement that:

> The Defendant planned ahead to kill his brother-in-law before his divorce from defendant's sister became final in order that she might receive insurance benefits and inheritance from the deceased Captain Dole [sic]. (R 109).

It's a good theory, unfortunately, there is nothing to support it. On the contrary, it is a fair inference that if such a policy did exist it would have been in evidence and paraded before the jury with great vigor.

It was gross error for the prosecutor to refer to facts outside the scope of the trial.[30] "The purpose of an opening statement is to tell the jury what the case is about and to outline the proofs", United States v Breedlove, 576 F2d 57, 60 (5th Cir. 1978). It should not be used to "...poison the minds of the jury against the defendant before the jury has heard the evidence, or to improperly prejudice the defendant in the eyes of the jurors, or to destroy his credibility", United States v Signer, 482 F2d 394, 398 (6th Cir. 1973).

Ordinarily it is not prejudicial if the prosecutor outlines in his opening the evidence he wishes to present at trial only to later discover that it cannot be used either because it is inadmissible or unobtainable.[31] If the prosecutor believes in good faith that the evidence will be presented and

29. (continued) 398 F2d 331 (5th Cir. 1968). In this case appellant's conviction was challenged as violating the Sixth Amendment because of the defense counsel's failure to make a voir dire examination of jurors. The Court disposed of the challenge because the trial record showed that counsel performed his duties with "zeal and ability, and received the commendation of the trial court..." supra at 332. This is not the situation in the case at bar. The record shows that defense counsel met his duties with anything but zeal and ability.

30. The ABA Standards Relating to the Prosecution Function provide: §5.5 Opening Statement. "In his opening statement the prosecutor should confine his remarks to evidence he intends to offer which he believes in good faith will be available and admissible and a brief statement of the issues in the case. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence." p. 119 (App. Draft, 1970).

31. The usual case is where the prosecutor says he will prove something and later, because of privilege or inadmissibility, the evidence cannot be produced at trial. See Reeves v Warden, 346 F2d 915, Gladden v Frazier, 388 F2d 777 (9th Cir. 1968).

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admissible at trial, no prejudice will be considered to occur. It is when the prosecutor purposefully includes the evidence in his opening statement when he has no intention of proving it at trial, that harm is said to arise. Gladden v Frazier, 388 F2d 777, 779 (9th Cir. 1968).

Any doubt about the good faith of the prosecutor in mentioning the insurance money in his opening statement is easily resolved by reference to his closing argument wherein he compounds the error by arguing the same fact. In spite of his failure to prove the existence of potential insurance money or its relationship to the instant case, the prosecutor as noted earlier, broached the subject again in his closing argument. He encouraged the jury to "look at the...evidence" (TT 242;R375), and argued that "...the motive is the money. The insurance he had as a Captain in the Army, that's what he was after. Greed." (TT 248;R 381).

The prosecutor's reference to these unproven and probably unprovable facts constitutes prejudicial error and is additionally violative of the American Bar Association Standards.[32]

In view of the prosecutor's opening and closing statements, the issue of whether Petitioner was motivated to kill Doe for money was surely central to the jury's consideration. Logic dictates that they jury relied heavily on the public official's declarations[33] and therefore convicted on facts never proven at best or non-existant at worst.

32. §5.9 Facts Outside The Record. "It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice. ABA Standards Relating To The Prosecution Function (App Draft, 1970), p. 129.

33. As the United States Court of Appeals for the Fifth Circuit has stated:
"In considering the impact of what is said the court also must be concerned with the great potential for jury persuasion which arises because the prosecutor's personal status and his role as a spokesman for the government tend to give to what he says the ring of authenticity. The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. That same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty." Hall v United States, 419 F2d 582, 582 (5th Cir. 1969).

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Not unlike the prosecutor in Miller v Pate, 386 US 1 (1976), who knowingly represented paint-stained shorts as "bloody", so did the prosecutor in the present case knowingly refer to facts not in evidence. The court in Miller ruled that the "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence," supra at 7. Petitioner urges that no constitutional distinction exists where a prosecutor knowingly used unproven facts to sway the jury.

The failure of defense counsel to object, move for mistrial or cautionary instruction, or for that matter, seek any remedy is simply incomprehensible.

D. WITNESS TETER'S IN-COURT IDENTIFICATION OF DEFENDANT, GAINED AS A RESULT OF SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES, WENT UNCHALLENGED BY DEFENSE COUNSEL

Witness Teter, like witnesses Moultrie and Barrett, testified as to having seen Mulligan at Fort Benning on the day of the murders.[34] However, witness Teter went further in his testimony, identifying Mulligan as having quarreled with the deceased (TT 106;R 231) and also identifying Mulligan as having a weapon in his possession (TT 107;R232). During cross-examination defense counsel posed the following questions and received the following answers.

CROSS EXAMINATION

BY MR. FITT:

Q: Now this is the first time that you've seen Mr. Mulligan since that afternoon, is that right?

A: No, sir.

Q: You talked with me on the telephone last week and you said you hadn't seen him since.

A: I saw him yesterday morning in the Courtroom.

Q: You saw him yesterday morning?

A: Yes, I did.

34. The testimony of Captain Moultrie had established that the deceased Captain Doe had been with two acquintances at Ft. Benning on the day of the murders (TT 112;R237). By Helms' own admission, he was one of the men present at Ft. Benning (TT 134;R 259).

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Q: Have you seen some photographs of him in the meantime?

A: I saw a snapshot of him.

Q: When did you see the snapshot?

A: I believe it was Monday afternoon about five-thirty, five o'clock.

Q: That's two days ago.

A: Yes, sir.

Q: Were you shown any other photographs?

A: No, sir.

Q: Just a snapshot of him?

A: Yes, sir.

Q: Did he explain to you when that snapshot was taken?

A: Yes, sir.

Q: When was it taken?

A: It was taken when he was brought back from New York. (TT 108-109;R 233-234).

At this point defense counsel apparently did not recognize a viable constitutional issue, to wit: whether or not "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v United States, 390 US 377, 389 (1968). Nor was counsel aware of this Court's statement in Simmons that the "danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw...", supra at 383. Rather than request a hearing outside the presence of a jury, defense counsel went on with a series of questions that did more to fortify the identification than challenge it.

Q: So you were shown a photograph of this man just two days ago and you're basing your identification on that photograph.

A: I'm basing my identification on the man that I saw two years ago.

Q: Two and a half years ago?

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A: Yes, sir. You don't see civilians in BOQ's , they are not supposed to be around, especially one that was holding a gun, sticks in your mind pretty good.

Q: Everyone was dressed in unifrom that morning?

A: No, sir.

Q: How did you know who was a civilian and who was not?

A: Because he had a beard, we don't have anyone in the military with a beard. (TT 109; R234).

These open-ended questions in place of a hearing on admissibility out of the presence of the jury displayed not only a glaring ignorance of the law, but a pathetic inability to cross-examine the state's witness.

Clearly, failure on the part of defense counsel to know existing law may result in the denial of the effective assistance of counsel. Boyer v Patton, 579 F2d 284 (3rd Cir. 1978) ; Rhinehart v Brewer, 561 F2d 126 (8th Cir. 1977). On an issue of constitutional significance such as suggestive pretrial identification procedures, the failure of counsel to request a hearing may well be deemed in and of itself the denial of effective assistance of counsel. Saltys v Adams, 465 F2d 1023 (1972). Petitioner urges that once the fact was established that the witness Teter who had not seen defendant for over two years had been shown one photograph of Petitioner two days prior to trial any reasonably competent attorney would have ended the questioning and requested a hearing out of the presence of the jury.

E. EXHIBIT 9

During the course of Helms' direct examination, the State elicited testimony to the effect that subsequent to the murders, Helms had accompanied Mulligan to Columbia, South Carolina, where Mulligan was looking for friends to try to establish an alibi. In order to bolster this testimony, the State offered Exhibit 9 which purported to be a note written by Mulligan to a friend in Columbia, South Carolina, who was not home. Helms testified that the note

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was left in his car. The note bears the name of Joseph Mulligan and in the right hand corner carries the date April 14, 1974. The prosecution made no effort during the course of the trial to match the handwriting on Exhibit 9 to any known samples of Petitioner.[35] During his closing argument, the prosecuting attorney made the following statement to the jury:

> Another thing that really puts it on him. Let me ask you to look, when you get to the jury room, look at State's Exhibit 9, which is the Ralston Hotel envelope. It's a note that is dated April 14 and it's signed Joseph Mulligan. Then look on the back of the Indictment where Mulligan signed the indictment and look at those two signatures when you get in the jury room. They are the same, he was here. He was in the Ralston Hotel. He killed this man. (TT 248-249; R 381-383).

What we have here is a prosecutor "testifying" as an expert as to matching signatures where one of the samples is not even in evidence. As bizarre as this may seem, and what is even more ludicrous, the defense attorney did not object. At the risk of dignifying the prosecutor's statements, we feel we should point out that Exhibit 9 was printed while Mr. Mulligan's signature on the Indictment is handwritten.

As with other types of personal opinions, a prosecutor may not assert his belief on issues properly the subject of expert testimony, King v United States, 372 F2d 383, 394 (D.C. Cir. 1979).[36] Thus, the prosecutor exceeded the boundaries of permissible conduct without objection from the defense.

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35. A copy of Exhibit 9 like the other exhibits, was made a part of the trial transcript and is located at page 316 of the trial transcript (R 448).

36. In King, the prosecutor asserted his belief that because a physical examination of the defendant failed to reveal organic impairment of the brain, defense counsel could not argue that defendant suffered from mental illness. He falsely based his opinion on the testimony of an expert witness which had concluded the contrary. The Court in King adjudged the prosecutor's argument to rest within the knowledge of an expert witness, not a prosecutor, and reversed and remanded the case.

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F. CLOSING ARGUMENTS

1. Prosecution's Closing Argument -- Guilt Stage

Although any competent attorney would have been on his feet during most of the state's closing argument, defense counsel did not object once to the prejudicial and overreaching closing argument of the prosecutor. In his closing argument, during the guilt stage, as noted earlier, the prosecutor not only referred to facts which were not admitted into evidence, he continually used inflammatory language and persistently expressed his personal opinions in order to persuade the jury to convict.

In referring to Petitioner, the prosecutor repeatedly described him as a "hit man" (TT 243;R376), butcher (TT 247;R380), "gangster" (TT 243, 249; R 376, 382) and other slanderous names.[37]

This conduct was impermissible for two reasons. The general rule prescribed by this Court dictates that a prosecutor may not rely upon a defendant's bad character to prove guilt unless the defense has sought to exculpate him by proof of good character, Michaelson v United States, 335 US 469, 479 (1948). Quite obviously, Petitioner Mulligan's good character was not put into issue because defense counsel failed to present a case on Petitioner's behalf. Thus, the prosecutor's reference to Petitioner's character was improper.

Secondly, the prosecution's language was unallowable because it was quite simply name calling. As the Court in United States v Windom, 510 F2d 989 (5th Cir. 1975) has explained, "Prosecuting attorneys are no longer permitted to indulge themselves, or their audiences, in unrestrained, abusive histrionics, giving their personal evaluations of what a low-down fellow the defendant really is", supra at 994. While such characterizations are improper, they will not provoke reversible error if the characterizations are supported

37. The prosecutor also referred to Petitioner as a "confirmed killer" (TT 243; R376).

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by evidence admitted at trial, supra at 994.

In the present case, there was no evidence admitted at trial to support the prosecution's references to Petitioner.[38] The prosecution's claim that Petitioner was a "hit man" is unsupportable because the state failed to prove that Petitioner killed for money. Likewise, the contention that Petitioner was a gangster[39] is unfounded. The use of these names were grounded upon the prosecutor's opinion, not on the evidence as it was presented to the jury.

The likelihood that the prosecutor's name-calling adversely influenced the jury against the Petitioner is great. As the Court in Hall v United States, 419 F2d 582 (5th Cir. 1969) explained, the use of uncomplimentary names "... is especially likely to stick in the minds of the jury and influence its deliberators." supra at 587. In Hall, the prosecutor called the defendant a "hoodlum". The Court of Appeals found the resulting harm to be so great that it reversed the defendant's conviction.

The prosecutor's use of inflammatory language amounted to prejudicial error. The prejudice resulting from the prosecutor's behavior is significant, because the issue affected by the misconduct was central to the issue of guilt or innocence. By claiming Petitioner was a hit man, and that the murders were horrible, the prosecutor influenced the jury to convict Petitioner on their emotional reaction to the prosecutor's suggestions rather than on the facts of the case.[40]

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38. When inflammatory remarks are made, the court should, at a minimum, sustain an objection and immediately and clearly instruct the jury that the argument is not supported by the evidence, Hall, supra, n. 33 at 585. United States v Pepe, 247 F2d 838 (2d Cir. 1957). Unfortunately, the minimum was not met in the present case. While the prosecutor purposefully tried to influence the jury against the Petitioner, both defense counsel and the trial court remained silent.

39. "Gangster" is defined as "a member of a gang of roughs, hirelings, criminals, thieves or the like", Lanzetta v New Jersey, 306 US 451 (1939).

40. In United States v Jenkins, 436 F2d 140 (D.C. Cir. 1970) the prosecutor characterized the accused as a "teenage hoodlum walking the streets of Washington". The Court noted that this type of statement should be avoided because the trial of the defendant was for rape, not being a hoodlum, Id. at 145. Likewise, the Petitioner in the present case is being tried for murder, not as a hit man or gangster.

Additional error was perpetrated by the prosecutor when he vouched for the veracity of the government's witness and expressed his personal beliefs to the jury.[41]

In his closing argument, the prosecutor attested that Timothy Helms, the government's witness, was telling the truth. He told the jury that Helms "...was telling the truth, you could just know he was doing it". (TT 246; R379). And that his "...testimony had a ring of truth to it." (TT 246; R379). Later, the prosecutor stated that Helms "...cooperated with the police throughout this investigation. And he is a truthful man, you could just tell by the way it was coming out". (TT 252;R 385). In the same breath the prosecutor repeated that Helms "...was telling the truth." (TT 252; R 385).

Expression of a personal belief is only tolerated when it is supported by the evidence at trial, United States v Rodriguez, 585 F2d 1234, 1243 (5th Cir. 1978). Otherwise, "it is impermissible for the prosecution to assert his own credibility as a basis for conviction", United States v Corona, 557 F2d 1386, 1389 (5th Cir. 1977).[42]

The rationale behind this rule is twofold. First, by expressing his personal opinion the prosecutor usurps the function of the jury. It is the jury's prerogative not the prosecutor's, to decide if a witness is telling the truth, United States v Grimm, 568 F2d 1136 (5th Cir. 1978); and if a defendant is guilty, United States v Morris, 568 F2d 396 (5th Cir. 1978).

Secondly, implicit in the assertion of a personal belief is the fact that the prosecutor has based his opinion on something other than the

41. §5.8(b) of the ABA Standards Relating To The Prosecution Function state:
"(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." p. 126 (App. Draft, 1970).
Additionally, the ABA Code of Responsibility provides:
"It is the duty of every trial lawyer not to assert his personal opinion as to the justness of a case, the credibility of a witness,...or as to the guilt or innocence of an accused..." ABA Code of Professional Responsibility §DR7-106(c)(4).

42. In some jurisdictions, expression of the prosecutor's personal opinion is reversible per se. See, Greenberg v United States, 280 F2d 472 (1st Cir. 1960); United States v Gonzalez Vargas, 538 F2d 631 (1st Cir. 1977); United States v Cotter, 425 F2d 450 (1st Cir. 1970); other jurisdictions ask if there is reason to believe that the statement affected the ultimate verdict of the jury, Devine v United States , 403 F2d 93, 96 (10th Cir. 1968), see also, Marks v United States, 260 F2d 377 (10th Cir. 1958).

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evidence of record, Gradsky v United States, 373 F2d 706, 710 (5th Cir, 1967).[43] or that by virtue of his experience, knowledge and intellect, the prosecutor has concluded that the jury must convict, United States v Bess, 593 F2d 749, 755 (6th Cir, 1979).[44]

The assertion of the prosecutor's personal opinions in the case at bar was certainly erroneous for they were not based on the evidence at trial. Though the prosecutor ostensibly based his opinion on the character and mood of Helms' testimony, he nonetheless improperly expressed his opinion of Helms' truthfulness.[45]

The Court in United States v Bess, supra, dealt with a situation similar to the case at bar. There, the prosecutor was careful to say that his opinion was "...based on the evidence that has been presented to you..." supra at 753. Yet, the Court in Bess saw through the prosecutor's language and recognized that his words were simply used as a guise for the assertion of his opinion. The Court stated that "We do not believe that the use of this disclaimer should convert improper argument into proper argument. The adverse impact of personal expressions of opinion is still present, regardless whether counsel purports to limit the basis of opinion to the facts at trial", supra at 756.

Vouching for a witness' credibility has been deemed to warrant reversal of a defendant's conviction by a number of counts. In United States v Garza, 608 F2d 659 (5th Cir. 1979) the defendant's conviction was reversed because the prosecutor vouched for his witnesses by stating, "If it wasn't the

43. In Gradsky, the prosecutor vouched for the government's witness. The Court held this to be prejudicial error which contributed substantially to the convictions. The convictions were consequently reversed.
44. In Bess, the prosecutor also impermissibly implied that the prosecution would not have been commenced if the defendant had not been guilty. As a result of this and the prosecutor's assertion that he believed the defendant to be guilty, the conviction was reversed.
45. The Court in United States v Dawkins, 562 F2d 567 (8th Cir. 1977) held the prosecutor's vouching for the government's witnesses not to be improper. It based its decision on the ground that the prosecutor merely characterized the witnesses' testimony as believable in its context. The Court also rationalized that the comments were acceptable because the prosecution's credibility was not placed into issue and he did not infer knowledge of information outside the scope of the trial, supra at 569. This decision is inapposite to the case at bar since the jury could have inferred from the prosecutor's comments that he knew of facts not presented at trial.

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man, the [the witnesses] wouldn't have any reason to say it", supra at 664.[46]

Similarly, in United States v Corona, 557 F2d 1386 (5th Cir. 1977), a reversal was ordered as a result of the prosecutor's comment that the government witness "...had the guts to tell the truth..." supra at 1389.[47] Like the comments in these cases, the prosecutor's statements concerning Helms' truthfulness were highly improper. Again, flagrant error not creeping but marching into the trial without objection from the defense.

G. PROSECUTOR'S CLOSING ARGUMENT -- PENALTY STAGE

If the prosecutor's closing argument during the guilt stage of the trial seemed harsh, it is rendered pallid when compared to his closing argument during the penalty stage. We recognize that any closing argument requesting a jury to impose the death penalty can hardly be done in a docile fashion. However, there have to be bounds of decency and wide as those parameters may be, this prosecutor managed to cross them. Again, without objection from defense counsel, the following are excerpts from his closing argument:

> Let me say this to you, that the death penalty is not something that we take lightly in the District Attorney's Office. I have been District Attorney now for six and a half years, and I think this is the fourth time that I have asked a jury to bring in a death sentence. I think on two other occasions one of the assistants who tried the case have asked for the death penalty. So, in a span of six and a half years, when we tried thousands of cases during that time, we have only asked for the death penalty six times. I tell you that so that you know that it's not something that we take lightly, we don't pick up a file and say, "Well, I'm going to ask for the death penalty in this case, this looks like a good one, and I'm going to ask for it." (TT 274-275; R 407-408).
>
> * * *
>
> And you saw the pictures, you saw how bad the bodies of these two people -- mutilated, bullet through his head and out through his eye, went through the back of her head and cut through her eye socket, high-powered gun at close range, shot her four times, dont; you know that the few seconds that she lived

46. The Fifth Circuit has explained that an attorney may properly state, "I believe that the evidence has shown defendant's guilt," but he may not state, "I believe that the defendant is guilty." Likewise, an attorney may say, "no conflict exists in the testimony of the prosecution's witnesses, but not, "The prosecution' s witnesses are telling the truth" or "I believe the prosecution's witnesses are telling the truth". See, United States v Morris, 568 F2d 396, 402 (5th Cir. 1978).

47. Argument going beyond the evidence transforms the prosecutor into a

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between the time that he shot Doe, before she died, it must have been just seconds of sheer horror? It was awful.

* * *

All right, another thing we think about, even though the crime was horrible, is there any chance that you can rehabilitate somebody? He is a human being too, says he is. Is there any chance that you can do something for him, make him better, help him some way? What is your answer in this case? The answer is obviously no. He is a confirmed killer, a murderer, he has to be. How could you form an intent to kill somebody, kill somebody for a few measly dollars, it couldn't have been a whole lot of money, it might have been to him, but it couldn't have been a lot of money, ride all the way thinking about it, sit up there in the hotel room and drink somebody else's whiskey that he brought you, drink his Coca-Colas, all the while in your mind knowing, "I'm just waiting, he's my victim, I'm just waiting to get him where I can shoot him in the head, do this job and get back to South Carolina."

Do you think you could ever rehabilitate anybody like that? Do you think they have any kind of program in any prison that could change him? Of course not. He is a confirmed criminal, a confirmed killer. Could you rehabilitate anybody who, after he had killed his intended victims, decide well, there's a woman over there, she saw it, I have to do something about her. Bam. "Please don't hurt me."

"Shut up, woman, let me kill you." Bam, bam, and he kills her. Do you think you could ever rehabilitate him? Of course not. So we disposed of those two matters. Horrible crime, no chance of rehabilitation. (TT 277-278; R 410, 411).

* * *

And you have said he was guilty. And Mr. Fitt this morning in his closing argument, when he started out he said this is a pat case. The State has all the evidence, it's a pat case for the State, and the evidence for the State is overwhelming. So you know that in this case there is plenty of proof, can be no doubt that he is the one that did it. (TT 279;R 412).

* * *

Then you say, well, I know you're saying it, why do we have to have the death penalty? Let me say this to you. Up until 1960 the death penalty was part of our criminal procedure, it was an appropriate sentence. We executed criminals from time to time. Then about 1960, executions began to drop off, some of the States abolished the death penalty statute. The last person that was executed in Georgia was in 1964, twelve years ago. And for the last twelve years the crime rate has been rising. Not only the petty types of crime, white-collar crimes, violent crimes of rape, murder, robbery, they have been on the rise every year.

47. (continued) witness. His unsworn testimony and personal opinions, can be extremely influential because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence. See,

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I say to you that the reason those crimes have been rising is because a would-be killer, a criminal, like Joseph Mulligan, knows that the worst thing that can happen to him is he would get life, not going to have to pay the supreme penalty. So when it comes down to him going to jail, or knocking off a witness, like Marian Miller, what does he do? He kills the witness. There is no percentage in letting the witness live, that might could put you in the penitentiary for life, when if you kill that witness, and the most you can still get if they catch you is still life. So, there is no reason not to kill a witness.

And when we keep on having murder after murder, killing after killing, and the point is, why let a victim live if it's an armed robbery, that type of crime, go ahead and kill him, stand an even chance of getting away with it, you don't have any witnesses left. And until we start giving the death penalty, until we start executing some of the criminals found guilty and sentenced to death, it's my opinion, my judgment, that we're going to continue to have a rise in crime rate, more murders, more armed robberies. (TT 279-280; R 412-413).

* * *

Now, let's think about how you are going to feel. Suppose you go back and vote to put him to death? I'm sure the question must be in your mind right now, "If I vote for him to get the death penalty, how is it going to affect me, how will I feel tonight when I get home? How will I feel when I have to face my wife, or my husband and family?" I don't know how you are going to feel, but I've had to face that question, I had to face it day before yesterday when we started this trial. I had to face it this morning when I knew I was going to stand up and ask for the death penalty.

I say to you, it's not going to bother me. I'm going home tonight, I'm going to eat supper, I'm going to sleep. Now, sometimes I don't sleep good, it might be something that keeps me awake, but it's another case down in the office that we have to try next week that is going to worry me, it's not going to be Mulligan's case that is worrying me tonight. I don't feel like I'm the one that is putting him to death if he dies in the electric chair. It's not you who are putting him to death in the electric chair. Do you know who is putting him to death in the electric chair? He did it himself. He is the author of his own undoing. He is the one who decided I'm going to Columbus and kill Patrick Doe, it wasn't you that decided that. He knew when he started down here the risk he was taking. He's a grown man, he's not a child. (TT 281-282; R 414-415).

* * *

Don't know much about Marian Miller, except she was a young 25-year-old woman, who knows what her life might have been had she been able to live. He took -- he decided whether or not they were going to live. And if we let him live, he's going -- do you want to put life and death in the hand of somebody like Mulligan? And I'm sure you'll say, "Well, he can go to the penitentiary for life, and he won't hurt anybody."

47. (continued) United States v Cotter, supra at 42.

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How about the guards that have to guard him down there? They are human, they have families, they have to be around him every day. Do you want to expose them to him? And worse then the guards, how about some fellow prisoner? Maybe some young person who is in prison, who can see the light at the end of the tunnel, knows that in a few years I'll be out, I can go straight, and my mama and my daddy are looking for me to get out and come home and make something out of myself. What's to keep him from murdering him in prison? (TT 284; R 417).

* * *

You know, you can compare -- this is a pretty good illustration, it's not original with me, but I heard it -- you can compare him with having cancer. Suppose you had cancer on your arm, you went to the surgeon, and he says you have cancer, we're going to have to remove your arm. That's horrible, terrible, it's going to hurt. But, if you don't remove your arm, pretty soon the cancer will kill you. So, you go ahead and allow the surgeon to cut your arm off to save the body. Joseph Mulligan, and people like him, are a cancer on the society in which we live today, they are destroying this Country in which we live, these criminals are, he's one of them. He's the cancer on this Country and we ought to get rid of him.

And I know it's bad, and I know it's a heavy responsibility to have to say, "Let's sentence him to death." But, that's what we need to save the rest of us. That's what we need to save society, to do away with people like him, and that's what the law is there for. That's what the Legislature enacted the law for, to take people out of our society forever, like Joseph Mulligan. (TT 286;R 419)

* * *

Let me say this to you, let me give you one more illustration, of what I think is life in this Country, and what has got to be done. I'm sure Mr. Fitt will stand up and tell you, he's human , be merciful, protect him, and get life, and all of that kind of stuff. And I say to you that the only appropriate sentence in this case is to take him completely out of society, and the only way to do it is by execution.

During my lifetime, we've had three major wars that this Country has been engaged in. Each time the Government drafted young men, as low as seventeen years of age, and brought them into the Army, trained them, gave them a rifle, put them behind a machinegun, and sent them overseas. And that's fine, I was one of them. I didn't go overseas, but I was drafted into the Army, spent my time in the Army. And those of us who were home when they drafted those young men, we equipped them, trained them, gave them a rifle, and told them to go overseas, and when you aim and look down the barrel of your rifle, if you see an enemy, pull the trigger and kill him, because he is an enemy of our Country. And we put that burden on seventeen year olds, the person he was looking down

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the rifle at knew he was a real enemy of his.

> Like I say, we've had three wars that we fought, where we drafted people to fight for us. We're in another war in this Country. We're in a war against criminals. We're in a war against the very likes of Sonny Mulligan there. He's our enemy, he's our enemy. And if we don't mind asking some 17-year-old kid to go to Vietnam, and kill a North Vietnamese, and in Korea, kill a North Korean, and in World War II, kill a German or a Jap, that he had never seen, and had never hurt him, is it asking too much of the twelve of you on the jury to go back there and say, "Look, we've got to get rid of this enemy in our society, we're not killing him, but he's put himself in a position where he ought to be taken out of society, and we have the backbone and intestinal fortitude to do it, then we're going to sentence him to death." I don't think it's too much to ask to do that. (TT 287-288;R 420-421).
>
> * * *
>
> We have the death penalty on the books. If there has ever been a case where a person ought to receive the death penalty, goodness knows, it's in this case. Here you have a man who is a hired killer, wearing a holster, carrying a gun, befriended, partied with his victim, waited until the right moment, killed him, and killed an innocent witness, for no reason except money. (TT 292; R 424)

Those arguments by the prosecuting attorney were so wanton in their disregard of existing law that they should speak for themselves. We will comment only briefly. §5.8 of the American Bar Association Standards Relating To The Prosecution Function provides:

> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

The prosecutor's closing argument during the death penalty stage amounted to one lengthy violation of the above quoted standard. The rhetoric used did not belong in an American courtroom.

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The prosecutor's "concern" for the lives of the prison guards and their families and any fellow prisoners that Mulligan might have if he were not sentenced to death, was a transparent ploy to arouse the fear of the jury. An almost identical argument was made in support of the death sentence in United States v Coppola, 479 F2d 1153 (10th Cir. 1973). In that case, the prosecutor argued:

> If Coppola is permitted to survive, he can continue doing what he has been doing and you will be turning him loose back in the prison yard, back at these witnesses who are courageous enough to come back here and to go back and set up his evil crimes again...Unless this man suffers death, no inmate, and particularly not those who have testified, can even lead normal, secure, safe lives...Contracts can be let from prison to the outside as well as the inside of the walls, supra, at 1163.

Although the Court in Coppola reversed the defendant's conviction on other grounds,[48] the Court responded to the prosecutor's improprieties by stating, "Methods designed to arouse prejudice, passion and use of invective are not proper argument", supra at 1163.[49]

The prosecutor also perpetrated prejudicial error by depicting Petitioner as the enemy of the jury.[50] He stated, "We're in a war against the very likes of Sonny Mulligan...He's our enemy, he's our enemy...we've got to get rid of this enemy in our society." (TT 288;R 421). This is clearly impermissible. The Court in United States v Barker, supra, commented, "It is beyond the bounds of propriety for a prosecutor to suggest that unless this defendant is convicted it will be impossible to maintain 'law and order'...", supra at 1025. The defendant's conviction in Barker was subsequently reversed.

Because there were no efforts to mitigate the harm caused Petitioner as a result of these comments, they were ultimately instrumental in swaying the jury toward choosing the death penalty. Since the death penalty issue was

48. Coppola's conviction was reversed and his case remanded primarily because of the prosecution's introduction of a witness' prior statement in order to impeach the witness. The Court held this to be prejudicial error since the prosecution had prior notice that the witness would deny the truth of the statement, 479 F2d at 1158.

49. In Greenberg v United States, supra, the prosecutor opined that defendant was unpatriotic because he failed to financially support the American war effort by only paying personal income tax of $17.41 in 1943. The Court reversed the conviction.

50. In Viereck v United States, 318 US 236 (1943) the prosecutor's call to patriotism was deemed improper and the defendant's conviction was reversed.

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central to the disposition of Petitioner's case, the prosecutor's remarks amounted to prejudicial error. Therefore, Petitioner's conviction must be reversed.

H. DEFENSE COUNSEL'S CLOSING ARGUMENT-- GUILT STAGE

The three page closing argument speaks pathetically for itself. (TT 254-256;R 387-389). Never a mention of reasonable doubt, never a mention of the presumption of innocence, never a hint that it was a reasonable hypothesis from the evidence that Helms was the triggerman. Nothing. If it is possible for this closing argument to have a low point, it is when the defense lawyer in effect confesses on behalf of Petitioner by telling the jury that he felt the case was too pat (TT 254;R387). An essentially one witness case--a case based on accomplice testimony of an immunized co-indictee, too pat? Indeed.

In United States v Hammonds, 425 F2d 597 (D.C. Cir. 1970), the Court ruled that defense counsel's futile closing argument, when combined with the many other errors and omissions, clearly reflected "...a pro forma defense and a lack of adequate representation in preparation and trial of the case," supra, at 604.[51] Applying the "mockery and farce" test, the Court reversed Hammond's conviction and remanded the case for a new trial.

I. DEFENSE COUNSEL'S CLOSING ARGUMENT -- PENALTY STAGE

Mr. Fitt's closing argument during the penalty stage was lengthier than his three page closing argument in the guilt stage. However, it was of little

51. Additional factors that led to the Hammonds decision included counsel's failure to conduct any voir dire examination of the jury. 425 F2d at 603.

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more substance. Rather than attempt to persuade the jury not to impose the death penalty, defense counsel, once again, admitted to the jury that the evidence appeared to be "overwhelming" [52] (TT 299-300;R 431-432). The jury returned verdicts of death as to both counts.

J. MOTION FOR NEW TRIAL AND THE APPEAL

On November 24, 1976, a notice of appeal was filed by trial attorney, Jay William Fitt, (R 67). On February 3, 1977, a motion for a new trial was filed with the trial court. In a terse statement, Attorney Fitt alleged newly discovered evidence as the grounds. The prosecution having filed a response to the Motion For New Trial (R 86), the Court ordered an evidentiary hearing to be held on the 19th day of December, 1977, at 9:45 a.m. (R 90). On December 21, 1977, an ex parte order was entered by the trial judge requiring the Sheriff of Muskogee County, Georgia and/or his lawful deputy to produce one James Everet to give testimony at the evidentiary hearing which had apparently been rescheduled for January 16, 1978. (R 92). The hearing was

52. Defense counsel's observation that the state's case seemed to be "pat" made during his closing argument during the guilt stage and a shocking statement during the penalty stage that "guilt was overwhelming" was in sharp contrast to the prosecutor's argument during the penalty stage. The prosecutor made Petitioner eat defense counsel's words with the following statement "And Mr. Fitt this morning in his closing argument when he started out, he said this is a pat case. The State has all the evidence. So you know that in this case there is plenty of proof, can be no doubt that he is the one that did it." (TT 279;R412). This statement was prefaced by the prosecutor's own personal opinion.

> "Even though the crime was horrible, and even though there was no chance of rehabilitation, I wouldn't ask you for the death penalty, I wouldn't ask you to go back and vote to find this man ought to be sent to the electric chair unless there was plenty of proof that he was guilty, and that he was the one that did it." (TT 278;R411).

Again, though the prosecutor purported to ground his comments on the proofs at trial, he still did nothing more than express his own personal belief about the guilt of Petitioner. When prosecutors have made similar comments, as in United States v Lamerson, 457 F2d 371 (5th Cir. 1972) the Court judged it to be improper and reversed the conviction. See, United States v Morris, 568 F2d 396, 402 (5th Cir, 1978); United States v Cotter, 425 F2d 450 (1st Cir. 1970); United States v Garza, 608 F2d 659 (5th Cir, 1979); Hall v United States, supra, at n.33; and United States v Schartner, 426 F2d 470 (3rd Cir, 1976).

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continued on order of the court to January 30, 1978 (R 93). On February 16, 1978, the court denied Defendant's motion for a new trial (R 94). Subsequent to the denial of the Motion For New Trial, apparently the court reporter's minutes were lost. The prosecutor filed a motion in the nature of a show cause requiring the court reporter, one Betty Nixon, to show cause why she should not be held in contempt for her failure to produce the transcripts of the hearing on the Motion For New Trial (R 95). Ms. Nixon filed a detailed response which alleged that the notes were lost (R 97-99). In place of a transcript of the Evidentiary Hearing the trial court filed a "Brief of Evidence" (R 474) which also contained his conclusions of law reaffirming his prior position denying the Motion For New Trial.

Accepting Judge Smith's Brief of Evidence in place and instead of the transcript of testimony taken on the Motion For New Trial, the revelations are fantastic in view of the background of the case. Witness Everet testified that he had personally dealt in drugs with the deceased and the immunized co-indictee Helms prior to April 13, 1974 and had, on occasion, seen the two of them argue.

The prosecutor's entire attack on any possible hypothesis that it was Helms, not Petitioner, that had killed Doe and Miller was predicated on lack of motive which in turn was predicated on a non-existing relationship between Helms and Captain Doe prior to April 13, 1974.

During the course of trial, the prosecutor had asked co-indictee Helms the following questions and received the following answers:

Q: Have you ever been to Columbus, Georgia in your life before April 13?

A: No I haven't.

Q: Have you ever met Captain Patrick Doe or Marian Miller in your life before you came to Columbus, Georgia?

A: No I haven't. (TT 163; R 290).

This theme was expounded during closing argument by the prosecutor:

> I'm sure Mr. Fitt is going to try to say, "Well, maybe Helms killed him."[53] But what reason did Helms have to kill Captain Doe? He had never been

53. This defense was obvious to everybody but defense counsel.

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to Columbus before, never seen the man before, he was on his way to a party with him, he helped him wash his car, he's a twenty-year-old kid a long way from home, and had the misfortune of falling in with a man like Mulligan, no more than a gangster. (TT 249;R383).

The trial court found that the apparently unchallenged testimony of Everet went only to the impeachment of witness Helms and did not bear "on the question of guilt or innocence of Mulligan." Even if that were the case, this impeachment was certainly not on a collateral matter but went to the core of the question of who was the murderer, Helms or Petitioner? Common sense dictates that witness Everet's testimony certainly did bear on the question of guilt or innocence of Mulligan.

Another fact that emerges from the trial judge's Brief of Evidence is that Attorney Fitt had actually interviewed Everet prior to trial. Why was he not called before? Why was there no explanation given by Mr. Fitt as to why he was not called before? And probably the most serious question of all, why was this viable issue never raised on appeal? This brings us to the appeal itself.

Defense counsel's appeal of Petitioner's case was pro forma. Under Anders v California, 386 US 738 (1967) defense counsel, on appeal, is obligated to "act in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae," supra at 744.[54] His role as an advocate requires that he support his client's appeal to the best of his ability", supra at 744.

Attorney Fitt's brief to the Georgia Supreme Court was of dubious value. In his seven-page argument, he averred four contentions for the

54. The ABA Standards On Criminal Appeals follows the Anders decision and note that "If the lawyer acts as the court would, the position of the appellant is not at all improved and may be worse." 75 (App Draft, 1970).

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Georgia Court to review. Yet, he cited practically no authority to support his arguments.[55]

The Supreme Court of Georgia did vacate the death sentence as to Count I based on the conclusion that the evidence did not support a finding of Ga. Code Ann. §27-2534.1(b)(7) or (4) as an aggravating circumstance and further that §(b)(7) which the jury predicated the death verdict on was not even submitted to them as an aggravating circumstance on Count I. This pyrrhic victory was due to the Georgia Supreme Court raising this issue sua sponte. In other words, defense counsel did not see fit to raise the Godfrey issue even though it was one of continuing concern in the Georgia Supreme Court. See, e.g., Harris v State, 237 Ga. 718, 732, 230 S.E.2d 1, 10 (1976); Blake v State, 239 Ga. 292, 236 S.E. 2d 637 (1977).

In effect, Attorney Fitt did nothing to advocate Petitioner's interest on review. He hardly can be said to have performed to the best of his ability.

K. INSTRUCTIONS

Defense counsel in this case requested no special jury instructions and it is hard to imagine such a failure in a case involving life or death. Included in his omissions were a failure to request a standard instruction on how the jury should view the testimony of an accomplice (see, e.g., Tillery v United States, 411 F2d 644 (5th Cir. 1969)). Further, no instruction was requested to the effect that the Defendant's failure to testify in his own behalf cannot be used in any way to infer or presume guilt. Georgia law requires the court

55. Aside from textual selections of the pertinent statutes involved in the case, defense counsel only cited a definition from Black's Law Dictionary (see Argument IV in Attorney Fitt's brief to the Georgia Supreme Court); and one case. (Argument III). However, the case was cited only so it could be distinguished.

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to give such an instruction upon timely request. Clay v State, 236 Ga. 398, 224 S.E. 2d 14 (1976).

L. EXTRADITION

The prosecution in this case was able to effectively put before the jury, without defense objection, the fact that the Defendant had fought extradition while Helms had cooperated fully by coming back to Georgia immediately waiving his right to fight extradition. In his opening statement, the prosecutor informed the jury:

> So they went out on the air base, the Marine Air Base, and as luck would have it, they saw the car that fitted that description and they watched it. And in a short time, Helms, the young 20-year-old man came out and got in the car and drove off the base. When he drove off the base, they stopped him and asked him to come to the Beaufort Police Station. They questioned him and he admitted to them what had happened, told them about Sonny Mulligan's participation in it. He waived extradition and came back to Columbus with them. He carried them out and showed them where the actual shooting took place at Nassau Place and Corinth, where they left the car at Allison's, which was about two and a half miles away, and where they threw the gun and the police recovered the gun, we'll have it for you today, where they threw the billfold, the identification of Captain Doe, we'll have that to present to you today.
>
> Now, I know you must be wondering , well, why wasn't this tried earlier. After 1974, he was indicted in August of 1974. We're going to show you that the defendant, Mulligan, fled. He wasn't arrested until March of 1975 and he was arrested in New York. We're going to show you that extradition proceedings were started, and it wasn't completed and he wasn't brought back to Georgia until March of this year, 1976. (TT 24-75;RI99-200) (Emphasis Supplied)

Again, without objection, during the direct examination of Helms, the prosecutor returned to this theme:

> BY MR. WHISNANT:
>
> Q: All right. Now, along about Thursday of the following week, or Wednesday, no, it was later than that, the following Sunday or Monday, did you meet some police officers from Columbus, Officers Cain and Miller?

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A: Yes, I did.

Q: Where did you see them at?

A: They seen me on the street driving, and they told me to come down to Headquarters.

Q: All right, did you go to Headquarters with them?

A: Yes, I did.

Q: Did you tell them substantially what you have told the Court here today?[56]

A: Yes, I have.

Q: Did you come on back to Columbus with them?

A: Yes, I did.

Q: You didn't wait to be extradicted, just came on back?

A: Yes.
(TT 152-153;R 277-278)

This type of evidence and argument is of the kind that makes the assertion of a legal right costly and, therefore, waters down that legal right. Griffin v State of California, 381 US 957, 85 SCt 1797(1965);[57] United States v Hughes, 411 F2d 461 (2nd Cir. 1968), cert denied, 396 US 867.[58]

Under Article IV, Section 2 of the United States Constitution the Defendant has the right to challenge extradition proceedings. Roberts v Reilly, 116 US 80 (1885).

The bottom line of the prosecutor's successful effort to interject the above testimony was to infer to the jury that Helms was a good guy for waiving extradition and that Mulligan was a bad guy for exercising his legal right. Improper statements and testimony were admitted without objection by defense counsel.

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56. This particular question also violated the historical rule against the use of prior consistent statements in order to bolster a witness before his credibility is attacked. Of course, no objection was made by defense counsel.
57. Error for the prosecutor to comment on the defendant's failure to testify.
58. Error for the prosecutor to comment that the defendant was doubly vicious because, knowing he was guilty, he demanded his full constitutional rights including trial at which the victim was required to testify.

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M. DEFENSE OPENING STATEMENT -- THE ALIBI THAT WAS NEVER PRESENTED

Petitioner's attorney outlined his defense in his 1-1/8 page opening statement:

> Now, we expect to show the defense of an alibi, that is, Mr. Mulligan was not here. He was not in Columbus, Georgia at the time that Mr. Whisnant or Mr. Helms, who will be the witness, claims he was, that he was in the breast of his own family back in Beaufort, that at the time that this event occurred, on or about Easter Sunday, 1974, which is a date that's significant, it's not just like any day of the week or any Sunday or any weekend, it was a special day, that members of his family will testify to you that Joseph Mulligan was indeed home. And, his being at home would preclude him absolutely from being involved in this.
>
> And we would expect based upon this, that you would return a verdict of not guilty. Thank you. (TT 77; R 202).

At the conclusion of the state's proofs, defense counsel rested his case without calling a witness. Needless to say, the prosecutor made hay in his closing argument of the defense lawyer's unfullfilled promise to provide an alibi defense.

> Now, yesterday Mr. Fitt told you in opening statement that the defense was alibi. We invoked the rule as to witnesses, which means the witnesses have to go outside of the Courtroom and can't hear the testimony. You saw the defendant's witnesses who were sitting right out there where they are now, get up and go to the witness room. The defendant never put those witnesses on the witness stand, he didn't do it. (TT 249; R382).

Petitioner recognizes that there are many legitimate reasons a lawyer may change strategy in midstream. Petitioner is further aware that the record is silent as to the reasons underlying the decision to abandon the alibi defense. Based on this record, it would be fair inference that it was just another example of incompetence and lack of preparation. However, taking this incident at its best, we will consider it just another question unanswered by the record, which standing alone, may have required a remand. It was another bizarre turn in a very bizarre case.

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N. DEFENSE COUNSEL'S FAILURE TO POLL THE JURY

When the jury announced their verdict of guilty as to all counts at the guilt stage, defense counsel expressed his desire not to poll the jury, (TT 268;R 401).

Again, when the jury returned their verdict of death as to both counts, the court inquired of defense counsel as to whether he wished the jury polled. Once again defense counsel declined the invitation. (TT 306;R 438). Was there not a possibility that one of the twelve convicting jurors standing in the courtroom facing Mulligan would have second thoughts about sending this man to Georgia's electric chair? As remote as that possibility may be, what in the world did defense counsel have to lose other than a few minutes? Was he afraid of alienating the jury at this point? There was nothing more that they could do. Standing by itself, this act or non-act as you will have it, may not be significant, but in the context of this trial, it is another glaring example of the defense counsel's complete indifference to his client's cause.

SUMMARY

The Chief Justice of this Court has demonstrated for more than a decade an implacable concern for the quality of representation afforded indigent defendants.[59] His courageous stand devoted to the improvement of the trial bar has indeed risked the enmity of the trial bar, however, no amount of law review articles can take the place of a strong United States Supreme Court decision setting the minimum standard of representation to be afforded indigent persons accused of crime and a fortiori those accused of captial crimes.

Petitioner recognizes that there are questions unanswered by this record. Petitioner also strongly urges that there are enough undisputed facts

59. Burger, The Special Skills of Advocacy, 8 J. Contemp. L. 163 (1977); Burger, Introduction: The ABA Standards for Criminal Justice, 12 Am. Crim. L. Rev. 251 (1974); Burger, Counsel for the Prosecution and Defense -- Their Roles Under Minimum Standards, 8 Am. Crim. L. Rev. 2 (1969).

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in this record demonstrating that Petitioner was denied the kind of competent representation expected of lawyers in criminal cases. This is the standard we urge this Court to adopt. We therefore respectfully pray that this Court use the approach taken by the United States Court of Appeals for the Fourth Circuit in Marzullo v Maryland, supra:

> If the material facts were in dispute or incompletely developed, we would remand the case for reconsideration in the light of the standard that we adopted in Part II of this opinion. But here the attorney's conduct at the voir dire and the jury's exposure to the proceedings involving the first indictment are undisputed matters of record. We believe therefore that a remand for an evidentiary hearing on the habeas corpus petition is unwarranted. 561 F2d at 546.

Like Marzullo, the record is adequate to decide the issue without resort to any state court remedies or federal habeas corpus.

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II. UNDER THIS COURT'S HOLDING IN GODFREY V. GEORGIA, PETITIONER'S DEATH SENTENCE CANNOT BE CONSTITUTIONALLY IMPOSED IN THAT GEORGIA CODE ANN. §27-2534.1(b)(7) WAS NOT DELIMITED BY THE GEORGIA COURTS; THE MURDER OF MARIAN MILLER DID NOT INVOLVE TORTURE NOR WAS IT INORDINATELY DEPRAVED; AND THE JURY'S FINDING OF AN AGGRAVATING CIRCUMSTANCE UNDER §27-2534.1(b)(2) IS INSUFFICIENT TO JUSTIFY RETENTION OF THE DEATH SENTENCE.

The jury's recommendation of death as to Count II was predicated on the two aggravating circumstances submitted during the penalty stage of the proceedings. The aggravating circumstances found were defined in Ga. Code Ann. §27-2534.1(b)(2)[60] and §27-2534.1(b)(7).

Underwriting Petitioner's claim that the trial court's instructions were inadequate to eliminate the possibility that the jury would invoke the death penalty for arbitrary and capricious reasons is the confusion which marked the return of their verdict for death. The jury was charged that it could impose the death sentence as to Count I of the Indictment if it found an aggravating circumstance under Ga. Code Ann. §27-2534.1(b)(4) (TT 271; R404). The jury's verdict of death was based on a different aggravating circumstance, to wit: §27-2534.1(b)(7).[61] The prosecutor brought this to the attention of the trial judge (TT 305; R 437), however, the trial judge did nothing to rectify the situation. Predictably defense counsel was silent then and on appeal as to this blatant disregard of human life.

The Georgia Supreme Court sua sponte, vacated Petitioner's sentence as to Count I because the evidence did not support a finding of §27-2534.1(b)(7) or (4) as an aggravating circumstance. (R 7). However, in its original opinion and its addendum to that opinion, the state supreme court incorrectly concluded that the death sentence imposed as to Count II was proper under Godfrey v Georgia, _____US_____, 100 SCt 1759 (1980).

It has long been recognized that the imposition of the death penalty may not be done in a capricious or arbitrary manner, arising out of passion or

60. §27-2534.1(b)(2) provides: "(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree."

61. Since the jury was befuddled at best or indifferent at worst, regarding the aggravating circumstances as to Count I of the Indictment, it is a reasonable inference that their state of mind was the same as to Count II.

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prejudice; for to do so is violative of the Eighth and Fourteenth Amendments. Furman v Georgia, 409 US 241 (1972).

In its latest efforts to further this constitutional imperative, the present Court has taken one more step in delineating the proper procedure to follow in invoking a sentence of death. The Court in Godfrey v Georgia, supra has set forth a two-tiered scheme that must be followed if the Georgia Courts wish to impose a death sentence based upon a finding of an aggravating circumstance under Ga. Code Ann. §27-2534.1(b)(7).[62] If the scheme is not complied with, the sentence of death will be vacated.

The first tier of the scheme encompasses the trial court's instructions to the jury. Since the language of §(b)(7) fails to imply "...any inherent restraint on the arbitrary and capricious infliction of the death sentence", the trial court is required to impose a narrowing construction upon §(b)(7) in its jury charge. Such a narrowing construction is to be grounded upon the Georgia Supreme Court's prior conclusions dealing with the application of §(b)(7).[63]

In instructing the jury, the trial court should insure that the evidence that the offense was "outrageously and wantonly vile, horrible or inhuman" demonstrate "torture, depravity of mind, or an aggravated battery to the victim", supra at 1766.

Secondly, for a jury to find "depravity of mind", it must find that the murderer had the type of mental state that led him to torture or to commit an aggravated battery before killing the victim, supra at 1766.

62. §27-2534.1(b)(7) states: "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."
63. See, Harris v State, 237 Ga. 718, 230 SE 2d 1 (1976) and Blake v State, 239 Ga. 292, 236 SE 2d 637 (1977).

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Finally, the word "torture" must be construed in pari materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death, supra at 1766.

As in Godfrey, none of these standards were used in the present case to delimit §(b)(7) to the jury. Rather, the trial court simply read the text of the statute in its jury charge. The practice of repeating the language of §(b)(7) is clearly inadequate to protect against capricious and arbitrary decisions. The statute offers a jury no guidance concerning its intended meaning, supra at 1765, and when the jury is allowed to arrive at a decision under this practice, its interpretation of §(b)(7) "...can only be the subject of sheer speculation", supra at 1765.

Quite obviously, the type of reasoned and channeled discretion envisioned in Furman v Georgia, supra, cannot be obtained through the jury instructions used in both Godfrey and the case at bar. This realization has compelled the Godfrey Court to adjudge the practice unconstitional, and to vacate the sentence of death in that case.

The Court should similarly act in the case at bar. There was nothing in the proceedings below to channel the jury's discretion. Nor was there anything done to guard against a capricious and arbitrary decision. The practice followed in the present case was violative of the Eighth and Fourteenth Amendments under the Godfrey test. Therefore, Petitioner's sentence must be invalidated.

The second tier of the Godfrey scheme, and the issue upon which that case apparently turned, involves the role of the Georgia Supreme Court in its sentencing review. Like the trial court, the State Supreme Court is also required to delimit §(b)(7) by applying the three definitional standards, supra at 1767. If the Georgia Supreme Court fails to do this, the present Court must ask whether, in light of the facts and circumstances of the case, the State Supreme Court can be said to have applied a constitutional construction of §(b)(7), supra at 1767.

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The United States Supreme Court was forced to do just this in Godfrey. Since the Georgia Supreme Court had not limited §(b)(7) in accordance with the standards set out in the Godfrey scheme, the present Court had to evaluate the State Court's construction of §(b)(7). It determined that the construction placed upon §(b)(7) was inaccurate because the "Petitioner's crimes could not be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." supra at 1767. The Court noted that "there was no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not", supra at 1767. Accordingly, the death sentence in that case was reversed.

Under the Godfrey holding, the death sentence in the case at bar must be vacated. The Georgia Supreme Court failed to delimit §(b)(7) in the manner required by the Godfrey scheme. In light of the facts and circumstances of the present case, it did not apply a constitutional construction of the statute. In its review of Petitioner's sentence the Georgia Supreme Court did little to delimit §(b)(7). Rather than apply the three criteria set forth by its earlier decisions, the Court in a cursory fashion concluded that the death sentence imposed under Count II was not done so under the influence of passion, prejudice or any other arbitrary factor. (R 8).

In its Addendum to its original Opinion, issued in light of Godfrey the State Supreme Court once again failed to narrow the meaning of the statute. While it attempted to align its decision with the Godfrey ruling by concluding that Petitioner had perpetrated serious physical abuse upon his victim, (R 10) it nonetheless skirted the gist of Godfrey by misinterpreting the meaning of "serious physical abuse". When the Court in Godfrey offered examples of serious physical abuse and torture, it cited situations where the victims had been beaten, burned, raped, strangled, and other heinous acts.[64]

64. The Court referred to McCorquodale v State, 233 Ga. 369, 211 SE 2d 577 (1979). (Defendant burned his victim with a cigarette, sliced her with a razor blade, cut her with surgical scissors and 'poured salt into her wounds'); House v State, 232 Ga. 140, 205 SE 2d 217 (1979) (defendant choked two 7-year-old boys after forcing them to submit to anal sodomy); Thomas v State, 240 Ga. 393, 242 SE 2d 1 (1977) (victim was beaten, shot and buried alive); Dix v State, 238 Ga. 209, 232 SE 2d 47 (1977) (victim was strangled so severely her blood hemorrhaged through the pores of her skin, the whites of her eyes and her eyelids and defendant severed her throat muscles and carved an "S" into her abdomen, all while victim was still alive); Birt v State, 236 Ga. 815, 225 SE 2d 248 (1976) (the two victims, who were both in their seventies, were slowly strangled with coat hangers over a prolonged period of time).

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Never did the Court imply that shooting a victim in the arm and shoulder within seconds of firing the fatal shot (if one believes Helms), as in the present case, constituted serious physical abuse.

Consequently, the state court's conclusion that Petitioner's victim was seriously abused is unfounded. The Addendum to its opinion failed to justify Petitioner's sentence under Godfrey.

Even if the other two criteria of the Godfrey test were applied to the present case, the shooting of Marian Miller would still not justify imposition of the death sentence.

Nowhere in the record is there evidence that the killing of Ms. Miller involved "torture, depravity of mind or an aggravated battery." Though she was shot a total of four times, there is no indication that she was tortured in the manner referred to in Godfrey.[65]

Moreover, Petitioner did not commit an aggravated battery.[66] Ms. Miller was not deprived of a member of her body or its usefulness, nor does the evidence support the conclusion that a member of her body was seriously disfigured.

It is also clear that Petitioner lacked the state of mind necessary to be considered "depraved". Although the Georgia Supreme Court believes that such depravity is evidenced by the fact that Petitioner shot Ms. Miller simply because she was a witness to the other murder, this conclusion is unfounded under Godfrey. The Godfrey court focused upon the intent to torture the victims, not the motive behind the Petitioner's acts. Thus, Petitioner's reason for shooting Ms. Miller is irrelevant under the Godfrey test.

65. Dr. Joe Martin Weber testified that Ms. Miller had been shot four times: once in the left forearm (TT 203; R 336), a second in the left shoulder (TT 204; R 337); a third shot in the upper right arm (TT 205;R338); and the fourth in the back of the skull (TT 205; R338). Dr. Martin stated that there was no way to determine the order of the shots (TT 203;R 336). It is quite possible that Ms. Miller was only wounded in her shoulder and arms before her death. This is not the type of serious physical abuse or torture envisioned by the Godfrey Court, see n. 64 .

66. "Aggravated battery" is a term that is defined in Georgia's criminal statutes. Ga. Code Ann. §26-1305 states: "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." It appears that this definition has on at least one occasion been treated by the state trial courts as controlling the meaning of the same words in §(b)(7). See, e.g., Holton v State, 243 Ga. 312, 317, n.1. 253 S.E. 2d 736, 740, n.1 (1979).

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Because the Georgia Supreme Court failed to delimit §(b)7) in accordance with the Godfrey scheme, it is up to the present Court to determine whether the State Supreme Court applied a constitutional construction of that statute. In light of the facts and circumstances of the case at bar, Petitioner's shooting of Ms. Miller was not inordinately heinous. Like Godfrey, there is nothing in the present case that distinguishes it from other murder cases in which the death penalty was not imposed. Petitioner's crimes cannot be said to "reflect a consciousness materially more depraved than that of any other person guilty of murder."

Since the procedure used by the Georgia Courts in handling §(b)(7) was violative of the Eighth Amendment under Godfrey, the next inquiry is whether the jury's finding of an aggravating circumstance under §(b)(2) is, in and of itself, sufficient to justify retention of Petitioner's sentence. Petitioner respectfully asserts that the answer to this question is clearly no. The fact that the jury found an aggravating circumstance other than that defined in (b)(7) does not immunize Petitioner's death sentence from invalidity under Godfrey.

Pursuant to Georgia procedure, a jury involved in the sentencing process makes its decision only after its attention has been directed to the specific circumstances of the crime and the characteristics of the person who committed the crime, Gregg v Georgia, 428 US at 197. The function of the statutory aggravating circumstances to direction the attention of the jury to all of the relevant factors of the case, supra at 197-198, 206-207.[67]

Even though a jury finds that more than one aggravating circumstance exists, it is nevertheless free to impose a life sentence. While the finding of one or more aggravating circumstances permits a sentence of death, the finding of such circumstances never requires that it be imposed, Bowen v State, 241 Ga 492, 246 SE 2d 322 (1978).

67. See, Fleming v State, 240 Ga. 142, 240 SE 2d, 37 (1977); cert denied 100 SCt 177 (1979).

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Under this scheme, each aggravating circumstance plays an important role in influencing the jury's decision. However, the weight given each circumstance by the jury is unclear and can only be the subject of "sheer speculation", 100 SCt at 1765.

If the jury is impermissibly allowed to base its decision upon a finding of a §(b)(7) circumstance, it is likewise impossible to determine whether the jury's decision to invoke the death penalty rested equally upon the improper finding of §(b)(7) and §(b)(2) is the sole reason for its decision.

This situation, which is present in the case at bar, invokes the rule that any ambiguity as to whether a judgment rests upon a constitutionally unsound footing requires its reversal.[68] Where the jury, through the trial court's instructions, is permitted to convict upon alternative legal theories, one of which is constitutionally permissible and the other of which is not, the jury's general verdict cannot stand. Stromberg v California, 283 US 359 (1931)[69]; Williams v North Carolina, 317 US 287 (1942)[70]; Terminello v Chicago, 337 US 1 (1949).[71]

> These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in a guilt-determining phase of any criminal trial. Pressnell v Georgia, 439 US 14, 19 (1978).

In fact, they should apply with added force, because of the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case", Woodson v California, 428 US 280, 305 (1979).[72]

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68. See, e.g., Shuttlesworth v Birmingham, 382 US 87, 91-92 (1965).
69. The defendant in Stromberg was convicted under a statute which consisted of three disjunctive clauses. The conviction was returned in the form of a general verdict. The Court held the first clause to be unconstitutional because it was overly broad. Since the Court could not determine if the defendant had been convicted on this clause alone, or on the other parts of the staute, the Court reversed the defendant's conviction. supra at 370.
70. The Stromberg decision was affirmed in Williams when that Court stated "...if one of the grounds for conviction is involved under the Federal Constitution, the judgment cannot be sustained", supra at 292.
71. As in Stromberg a multi-sectional statute in Terminello provided the basis for the conviction of the defendant. Part of the statute was later deemed unconstitutional and the conviction was consequently reversed. The reversal was grounded on the fact that since the jury had returned a general verdict, a reviewing court was unable to determine if the conviction rested upon unconstitutional section of the statute, or on the sections of statute that were left standing.
72. Woodson makes it intolerable that a death sentence should be carried out where there is any ambiguity in the record as to whether constitutional requirements for capital sentencing have been observed. See also, Witherspoon v Illinois, 371 US 570, 522 n. 21 (1968) (requiring that an excluded venire person's voir dire examination made "unmistakenly clear" that he or she met proper

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Because it cannot be said with assurance that the improper finding of a §(b)(7) circumstance played no part in the jury's decision to impose the death penalty, Petitioner 's death sentence should be vacated. The jury's finding of a §(b)(2) circumstance does not serve to exempt the death penalty in the present case from invalidation under Godfrey.

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72. (continued) constitutional standards for exclusion) and Andres v United States, 333 US 740, 752 (1948) (In death cases doubts regarding how defective jury instructions may have affected the jury's sentencing deliberations should be resolved in terms of the accused).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Supreme Court.

Respectfully submitted,

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Dated: July 18, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 80-5119

ORIGINAL COPY

JOSEPH MULLIGAN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

I.

Never having been presented to any court below, is the issue of the effectiveness of Petitioner's trial counsel properly before this Court?

II.

Were the second and seventh statutory aggravating circumstances properly charged and applied in this case?

STATEMENT OF THE CASE

Petitioner, Joseph Holcombe Mulligan, was indicted by the Muscogee County, Georgia, grand jury for the murders of Patrick A. Doe and Marian Jones Miller, and for theft by taking. Following his jury trial, Mulligan was found guilty on all counts and sentenced to death for each murder and to thirty days for the theft by taking.

Mulligan's convictions and death sentences were appealed to the Supreme Court of Georgia in Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204 (1980). The evidence, set forth in detail in the appellate decision, showed that Mulligan offered his coindictee, Timothy Helms, $1,000.00 to drive Mulligan to Columbus, Georgia, to "ice somebody." The two registered at a Columbus hotel under false names; the following afternoon they visited Patrick A. Doe, an army captain at Fort Benning and the Petitioner's brother-in-law. As the Supreme Court of Georgia recounted:

> That evening, with the appellant and Helms sitting in the back seat (the appellant seated directly behind the driver's seat), Captain Doe drove to the house of Marian Jones Miller, the captain's girlfriend, to pick her up for a party. When Captain Doe left the car to get Ms. Miller, the appellant announced to Helms that he would "do it in the next two blocks."
>
> Following Captain Doe's return to the driver's seat and shortly after the car had begun to move again, the appellant held a .38 special automatic in a .45

> frame, which the appellant had earlier borrowed from the captain, to the captain's head. The appellant fired once. He then ordered Helms to grab the now-abandoned steering wheel, but Helms was unable to do so before the car had struck both a stop sign and a mailbox.

245 Ga. at 266-67. Evidence also showed that Ms. Miller begged for help after having been shot by Mulligan. Mulligan's response to the woman's pleas was to "put the gun in her back and [shoot] her again and [say], 'Shut up, woman.'" 245 Ga. at 882.[1/]

The Supreme Court of Georgia vacated the death penalty imposed for Count 1, the murder of Captain Doe, because the evidence did not support either the statutory aggravating circumstance charged [Ga. Code Ann. § 27-2534.1(b)(4)] or the statutory aggravating circumstance found by the jury [Ga. Code Ann. § 27-2534.1 (b)(7)]. The court directed a life sentence be imposed. The second death sentence, based upon two statutory aggravating circumstances [Ga. Code Ann. § 27-2534.1(b)(2) and (7)] was affirmed.

If necessary to address adequately any issue raised in the petition, additional facts will be recounted in the remaining portion of this brief.

[1/] The Supreme Court of Georgia reconsidered their opinion in Mulligan in light of this Court's opinion in Godfrey v. State, ___U.S.___, 100 S.Ct. 1759 (1980), and in an addendum reaffirmed the death penalty imposed for the murder of Ms. Miller. 245 Ga. 881, ___S.E.2d___(1980).

REASONS FOR NOT GRANTING THE WRIT

I. NEVER HAVING BEEN PRESENTED TO ANY COURT BELOW, THE ISSUE OF THE EFFECTIVENESS OF PETITIONER'S TRIAL COUNSEL IS NOT PROPERLY BEFORE THIS COURT.

As Petitioner indicates at the outset of his petition, the issue of ineffective assistance of trial counsel is raised for the first time in this Court. For good reasons, this Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. . . ." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). See also Tacon v. Arizona, 410 U.S. 351, 352 (1973). The reasons for the rule are grounded in jurisdiction, comity, and the necessity of the full development of issues presented to the Court.

Petitioner urges this Court to review the record and transcript, find plain error in the representation afforded Petitioner, and adopt a nationwide standard of effectiveness for criminal counsel. Vachon v. New Hampshire, 414 U.S. 478 (1974), cited by Petitioner as one instance when this Court has found plain error from the record on an issue not previously raised, involved a finding of a complete lack of evidence to support a necessary element of the crime for which Vachon was convicted. The issue Petitioner Mulligan seeks to present may not be disposed of so readily. Petitioner has available the forums of state and federal habeas corpus courts to present the issue of ineffective assistance of counsel as well as any other he deems appropriate. Petitioner would have this Court decide the issue of ineffective assistance of counsel with no testimony from the trial counsel explaining why he did or did not perform any of the services complained of.

This Court should not be required to dispose of a crucial constitutional question on such a scant record.

Respondent can find no decision of this Court finding plain error in the assistance of counsel at this stage of appellate proceedings. The rule in the Fifth Circuit is that:

> . . . claims of inadequate representation cannot be determined on direct appeal where such claims were not raised [in the court below] and there has been no opportunity to develop and include in the record evidence bearing on the merits of the allegations.

United States v. Stephens, 609 F.2d 230, 234 (5th Cir. 1980). Accord United States v. Brown, 591 F.2d 307 (5th Cir. 1979); United States v. Rodriquez, 582 F.2d 1015 (5th Cir. 1978).

Petitioner should be required first to present this issue to an appropriate forum in order to develop the issue fully for this Court's consideration. The first allegation of error presents no reason for granting the writ.

II. THE SECOND AND SEVENTH STATUTORY AGGRAVATING CIRCUMSTANCES WERE CHARGED AND APPLIED PROPERLY IN THIS CASE.

The second issue presented is a dual one: (1) was Ga. Code Ann. § 27-2534.1(b)(7) charged and applied properly under the facts of this case, and assuming it was not, (2) can the death penalty be based upon a second statutory aggravating circumstance found by the jury?

In fact, the trial court correctly charged and the evidence amply supported both statutory aggravating circumstances. Indeed, the Supreme Court of Georgia reexamined its decision immediately after this Court's decision in Godfrey v. State, supra. That court found that "the evidence supports a reasonable trier of fact's finding, beyond a reasonable doubt, that the appellant's murder of Ms. Miller was 'outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind.'" 245 Ga. at 881-82. The evidence showed the first shot, and possibly the first three shots, only wounded Ms. Miller; having been shot, she begged for assistance saying, "Help me, I'm hurt, please help me." 245 Ga. at 882. Ms. Miller was shot in the left forearm, the left shoulder, the right upper arm, and the midportion of the back of the skull; the exit wound of the latter shot was the right eye. As the state supreme court found, "[t]his testimony clearly demonstrates that the fatal shot to the skull was not the first shot fired and that Ms. Miller suffered serious physical abuse prior to death." Id. (emphasis in original). The facts clearly evidence torture to the victim as well as depravity of mind of the defendant.

Petitioner attempts to bring his case under the holding in Godfrey v. Georgia, supra, because of alleged error in the application of Ga. Code Ann. § 27-2534.1(b)(7). Contrary to Petitioner's assertions, Godfrey mandates this Court's denial of the present petition.

Section (b)(7) provides for imposition of the death penalty to a person convicted of murder if the evidence shows the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." This Court has held that the code section is not unconstitutional on its face. Gregg v. Georgia, 428 U.S. 153 (1976). In Godfrey, this Court found that the statute had not been applied constitutionally to the facts in that case. It was determined that the deaths were instantaneous and involved neither torture nor aggravated battery.

Petitioner contends that although he shot Ms. Miller four times, at least one of which shots was fired as she was pleading for help, she was not "tortured in the manner referred to in Godfrey." (Petitioner's brief at 51). As this Court is aware, after the decision in Godfrey v. Georgia, supra, the Supreme Court of Georgia considered at length the proper application of § (b)(7). Hance v. State, ___Ga.___, ___S.E.2d___(Case No. 36012, decided June 24, 1980). Relying in part on this Court's opinion in Godfrey, the Hance court held that "[t]orture occurs when the victim is subjected to serious physical abuse before death. . . . Torture also occurs when the victim is subjected to an aggravated battery as hereinabove defined." (slip opinion at 7). The court further found that "[e]vidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse

(i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant." (slip opinion at 8).

The court in Hance even used Petitioner's case to demonstrate the appropriateness of § (b)(7):

> Insofar as aggravated battery and torture are concerned, only facts occurring prior to death may be considered. The death of a victim who dies instantaneously with little or no forewarning does not involve torture or aggravated battery. . . . Mulligan v. State, 245 Ga. 266 (264 SE2d 204) (1980); i.e., only facts showing aggravated battery or torture (as hereinabove defined), which are separate from the act causing instantaneous death, will support a finding of torture or aggravated battery. . . .

(slip opinion at 8). Plainly, under this Court's opinion in Godfrey and the Georgia Supreme Court's explication of § (b)(7)'s application in Hance, the seventh statutory aggravating circumstance was correctly charged, amply supported by the evidence, and appropriately found by the jury.

Finally, it is beyond dispute that the murder of Ms. Miller was committed while the offender was engaged in the commission of another capital felony, to wit: the murder of Captain Doe. Thus, two statutory aggravating circumstances existed and were found by the jury. The Supreme Court of Georgia has found in numerous cases that where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based

thereon. Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979); Gregg v. State, 233 Ga. 117, 127-28, 210 S.E.2d 659 (1974). See also Gregg v. Georgia, 428 U.S. 153, 161-62 (1976).

There is no doubt that the facts of the case authorize a finding of both the second and seventh aggravating circumstances as previously set forth in this brief; nevertheless, even if one were assumed to be erroneously found, the death sentence would still be appropriate. The second reason asserted provides no basis for granting the writ.

CONCLUSION

No sufficient reasons having been presented, the petition for writ of certiorari should be denied.

Respectfully submitted,

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